No. 89-1679

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

SUMMIT HEALTH, LTD., MIDWAY HOSPITAL MEDICAL CENTER, THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER, MITCHELL FELDMAN, AUGUST READER, M.D., ARTHUR N. LURVEY, M.D., JONATHAN I. MACY, M.D., JAMES J. SALZ, M.D., GILBERT PERLMAN, M.D., MARK KADZIELSKI and WEISSBURG AND ARONSON, INC.,
Petitioners,

VS.

SIMON J. PINHAS, M.D.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

J. MARK WAXMAN*
TAMI S. SIMASON
WEISSBURG AND ARONSON, INC.
ATTORNEYS AT LAW
2049 Century Park East
Suite 3200
Los Angeles, California 90067
(213) 277-2223
Counsel for Petitioners

LAWRENCE SILVER*
LAWRENCE SILVER
A LAW CORPORATION
10920 Wilshire Boulevard
Suite 800
Los Angeles, California 90024
(213) 443-9500

BLECHER & COLLINS
611 West Sixth Street
28th Floor
Los Angeles, California 90017
(213) 622-4222
Counsel for Respondent

*Counsel of Record

PETITION FOR CERTIORARI FILED
APRIL 24, 1990
CERTIORARI GRANTED JUNE 18, 1990

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RELEVANT DOCKET ENTRIES

May 21, 1987 — Filed Complaint. Issued Summons.

July 13, 1987 — First Amended Complaint and Jury Demand. Issued Summons.

October 7, 1987 — Order dismissing defendant State of California Board of Medical Quality Assurance without prejudice, pursuant to stipulation, entered.

October 7, 1987 — Ordered, adjudged and decreed that plaintiff's complaint against Summit Health, Ltd., Midway Hospital Medical Center, the Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, M.D., Arthur N. Lurvey, M.D., Richard E. Posell, Jonathan I. Macy, M.D., James J. Salz, M.D., Gilbert Perlman, M.D., Peggy Farber, Mark Kadzielski and Weissburg and Aronson, Inc. is hereby dismissed without leave to amend (entered October 9, 1987).

October 22, 1987 — Plaintiff filed notice of appeal to Ninth Circuit Court of Appeals from order entered October 9, 1987.

February 22, 1990 — Mandate from Ninth Circuit Court of Appeals affirming in part and reversing in part and remanding the judgment of the United States District Court.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
NO. 8703292 FFF (GHKx)

SIMON J. PINHAS, M.D.,
Plaintiff,
vs.
SUMMIT HEALTH, LTD., a corporation; MIDWAY HOSPITAL MEDICAL CENTER, a California general hospital; THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER, an unincorporated association; MITCHELL FELDMAN; AUGUST READER; ARTHUR N. LURVEY; RICHARD E. POSELL, JONATHAN I. MACY; JAMES J. SALZ; GILBERT PERLMAN; PEGGY FARBER; MARK KADZIELSKI; WEISSBURG AND ARONSON, INC; and STATE OF CALIFORNIA BOARD OF MEDICAL QUALITY ASSURANCE,
Defendants.

FIRST AMENDED COMPLAINT FOR VIOLATION OF CONSTITUTIONAL RIGHTS AND CIVIL RIGHTS (42 U.S.C. § 1983 and § 1985(3)); DECLARATORY JUDGMENT AND TREBLE DAMAGES FOR VIOLATION OF SECTION 1 OF THE SHERMAN ANTI-TRUST ACT AND INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

LAWRENCE SILVER, A LAW CORPORATION
LAWRENCE SILVER
9100 Wilshire Boulevard, Suite 3600
Beverly Hills, California 90212
Attorneys for Plaintiff
Simon J. Pinhas, M.D.

STATEMENT AS TO JURISDICTION

1. This civil action arises under the Constitution of the United States and 42 U.S.C. § 1983, § 1985, and § 1988; 28 U.S.C. § 2201 and § 2202, and 15 U.S.C. § 1.

2. This court has jurisdiction of the action under 28 U.S.C. § 1331, § 1337 and § 1343, and 15 U.S.C. § 4 and § 15.

3. The matter in controversy exceeds Ten Thousand Dollars ($10,000), exclusive of interest and costs.

VENUE

4. Venue is proper pursuant to 28 U.S.C. §§ 1391 and 1392.

PARTIES

5. Plaintiff, Simon J. Pinhas, M.D., ("Dr. Pinhas") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye physician and ophthalmological surgeon. Plaintiff presently, and at all times stated herein, was a Board certified surgeon, having been certified in 1982. Plaintiff has been engaged in the practice of medicine and surgery since 1977 and as such as engaged in interstate commerce. Until the grievances hereinafter complained of, plaintiff was a member, in good standing, of the defendant Medical Staff of Midway Hospital. Plaintiff is a citizen of the United States and a resident of the State of California and this judicial district.

6. Defendant Summit Health Ltd. ("Summit Health") is a corporation authorized to do business pursuant to the laws of the State of California and is the parent of

Midway Hospital and Medical Center. Summit Health is engaged in interstate commerce and owns and operates approximately 19 hospitals and 49 nursing home facilities in California, Arizona, Colorado, Oregon, Iowa, Washington, Texas and Saudi Arabia.

7. Defendant Midway Hospital Medical Center ("Midway Hospital") is engaged in interstate commerce and is a general hospital organized and existing pursuant to the laws of the State of California and conducts its business by providing medical facilities and medical care in Los Angeles, California.

8. Defendant Medical Staff of defendant Midway Hospital ("Medical Staff") is an unincorporated association of physicians engaged in interstate commerce practicing medicine at Midway Hospital with its principal place of activity located at Los Angeles, California. Defendant Medical Staff, in a conspiracy with other defendants, has wrongfully summarily suspended plaintiff and has commenced and prosecuted an unjustified, illegal and unconstitutional peer review proceeding ("Peer Review Proceeding") against plaintiff.

9. Mitchell Feldman ("Mr. Feldman") at all times mentioned herein was the regional vice-president of defendant Summit Health, a citizen of the State of California, and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

10. Defendant August Reader, M.D. ("Dr. Reader") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye

physician and ophthalmological surgeon and is competition with plaintiff Dr. Pinhas. Dr. Reader is engaged in interstate commerce and is a member of the defendant Medical Staff, a citizen of the State of California, and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

11. Defendant Arthur Lurvey, M.D. ("Dr. Lurvey") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and at all times mentioned herein was the Chief of Staff of Midway Hospital. Dr Lurvey is engaged in interstate commerce, is a citizen of the United States, resident of the State of California and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

12. Defendant Richard E. Posell ("Mr. Posell") is, and at all times herein mentioned was engaged in interstate commerce and was, an attorney at law, duly admitted and practicing law in the State of California and is a citizen of the United States, resident of the State of California and a resident of this judicial district, and has caused, directly or indirectly, the prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

13. Defendant Jonathan I. Macy, M.D. ("Dr. Macy") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye physician and ophthalmological surgeon and is in competition with plaintiff Dr. Pinhas. Dr Macy is engaged in interstate commerce and is a member of the defendant Medical Staff, a citizen of the State of California, and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

14. Defendant James J. Salz, M.D. ("Dr. Salz") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye physician and ophthalmological surgeon and is in competition with plaintiff Dr. Pinhas. Dr. Salz is engaged in interstate commerce and is a member of the defendant Medical Staff, a citizen of the State of California, and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

15. Defendant Gilbert Perlman, M.D. ("Dr. Perlman") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye physician and ophthalmological surgeon and is in competition with plaintiff Dr. Pinhas. Dr. Perlman is engaged in interstate commerce and is a member of the defendant Medical Staff, a citizen of the State of California, and a resident of this judicial district, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

16. Defendant Peggy Farber ("Ms. Farber") is employed by defendants Summit Heath and Midway Hospital in their Risk Management Section. At the direction of her employers and others, she was charged with (a) securing the information which was placed in the false charges brought against Dr. Pinhas and (b) interfering with Dr. Pinhas' defense against those charges at the Peer Review Proceedings. Ms. Farber is a citizen of the State of California, and a resident of this judicial district.

17. Defendant Mark A. Kadzielski ("Mr. Kadzielski") is a principal of defendant Weissburg & Aronson Inc., and at all times herein mentioned was engaged in interstate commerce and was, an attorney at law, duly admitted and practicing law in the State of California. Mr. Kadzielski is a citizen of the State of California, and a resident of this judicial district, and has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

18. Defendant Weissburg & Aronson Inc. ("W&A") is engaged in interstate commerce and is a professional corporation engaged in the practice of law in the State of California and this judicial district, and has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

19. Defendant State of California, Board of Medical Quality Assurance ("BMQA") is an agency of the State of California created by and existing pursuant to Business and Professions Code, § 2000 et seq. Defendant BMQA is charged with the responsibility of enforcing, among others, Sections 805, 805.1 and 805.5 of the California Business and Profession Code as well as Section

423 et. seq. of the Health Care Quality Improvements Act of 1986, 42 U.S.C. § 11133, et. seq.

20. Relief is sought against each and all defendants, as well as their agents, assistants, successors, employees, attorneys, representatives and all persons acting in concert or in cooperation with them or at their direction.

FACTUAL ALLEGATIONS

21. From October, 1981 through the present, plaintiff Dr. Pinhas, a diplomat of the American Board of Ophthalmology, has been a member of the defendant Medical Staff. As such, he has had the right to cause the admission of his patients to defendant Midway Hospital and to use defendant Midway Hospital's facilities for the care and treatment of his patients, including, but not limited to, the facilities to perform eye surgery.

22. By reason of his training, experience and skill, Dr. Pinhas holds a national and international reputation as a specialist in corneal eye problems. He performs general eye surgery and specifically cornea transplants, cataract removal, and interocular lens replacements. Because of his training, experience and skill, Dr. Pinhas is able to perform these surgeries with a high level of success and with few, if any, complications. One of the reasons for his success is the rapidity with which he, as distinguished from his competitiors, can perform such surgeries. The speed with which such surgery can be completed benefits the patient because the exposure of cut eye tissue is drastically reduced. Some of Dr. Pinhas' competitors regularly require, on the average, six times the length of surgical time to complete the same procedures as Dr. Pinhas. Because of his reputation, skill and successes Dr. Pinhas has performed more surgeries than any other

ophthalmic surgeon at Midway Hospital during the relevant time period.

23. Prior to February, 1986, the common practice in Los Angeles County was to have most eye surgeries, especially cataract extractions, performed by a primary surgeon and a second, assistant surgeon. This practice required by the defendant Medical Staff, the ("assistant surgeon requirement"), significantly increased the cost of such eye surgeries.

24. In February 1986, the administrators of Medicare, the federal health insurance program for the elderly, determined that assistant surgeons were not necessary in connection with the performance of such eye surgeries and refused, henceforth, to provide reimbursement for the charges of any such assistant.

25. Certain ophthalmic surgeons of staff at defendant Midway Hospital, including plaintiff Dr. Pinhas, requested that the defendant Medical Staff modify its assistant surgeon requirement. Nearly all hospitals in Southern California, except defendant Midway Hospital and Cedars-Sinai (whose Medical Staff overlaps with that of defendant Midway Hospital), abolished the assistant surgeon requirement at or about the time that Medicare made its change. The request to eliminate the assistant surgeon requirement at Midway Hospital was denied and remains in effect at the time of the filing of this First Amended Complaint.

26. The consequence of the failure to make the change was that surgeons, such as the plaintiff, would have to compensate their competitors to be their assistants during surgery since Medicare would no longer compensate such assistants. Plaintiff Dr. Pinhas advised the administration of Midway Hospital that the additional costs to

him of the Medical Staff's refusal to eliminate the assistant surgeon requirement would be about $60,000 per year. Dr. Pinhas, expressing a desire to keep the bulk of his practice at defendant Midway Hospital, nonetheless stated that he would move his practice if the assistant surgeon requirement was not abolished.

27. On or about January 26, 1987 defendants Summit Health and Midway Hospital, seeking to resolve the difficulty created by defendant Medical Staff's refusal to abolish the assistant surgeon requirement and Medicare's refusal to reimburse for assistant surgeons. Defendant Summit Health and Midway Hospital offered a "sham" contract to Dr. Pinhas, a true and correct copy of this "sham" contract is attached hereto and made a part hereof as Exhibit "A". The scheme provided by this "sham" contract was to "hire" Dr. Pinhas for $36,000 per year (later raised orally to $60,000 per year) to perform certain services, except, Dr. Pinhas would never be called upon to do such work. The "sham" contract was a vehicle by which defendants Summit Heath and Midway Hospital would pay Dr. Pinhas for continuing to bring patients to Midway Hospital. When the "sham" contract was explained to Dr. Pinhas, he was told that many of the members of the defendant Medical Staff had similar contracts, and that the Chief of the defendant Medical Staff, defendant Dr. Lurvey, was aware of this proposed contract and the other "sham" contracts.

28. Dr. Pinhas refused to in anyway participate in such a scheme, refused to sign the contract, and refused to return the contract, even after defendant Dr. Lurvey, acting on behalf of himself, defendant Summit Health, defendant Mr. Feldman, defendant Midway Hospital and defendant Medical Staff threatened that plaintiff's failure to do so would cause a review of his charts and possible

Peer Review Proceedings. Nevertheless, defendants Summit Health and Midway Hospital made one monthly payment of $5000 to Dr. Pinhas. This payment was "hidden" in a reimbursement check to Dr. Pinhas and was promptly recorded by Dr. Pinhas as an overpayment and a credit against the amount of defendants Midway Hospital and Summit Health otherwise owed Dr. Pinhas.

29. By letter dated April 13, 1987 ("April 13, 1987 letter"), and without prior notice or an opportunity for a hearing, Dr. Pinhas was advised by defendants Summit Health and Midway Hospital, through defendants Dr. Lurvey and Mr. Feldman, that he was summarily suspended as of that immediate date. As such, Dr. Pinhas was deprived of all medical staff privileges, including the right to admit his patients and to perform surgical procedures. The April 13, 1987 letter stated that such action was the result of a "medical staff review of Dr. Pinhas' medical records, with consideration as to the questions raised regarding: indications for surgery; appropriateness of surgical procedures in light of patient's medical condition; adequacy of documentation in medical records; and ongoing pattern of identified problems." (A true and correct copy of the April 13, 1987 letter is attached hereto as Exhibit "B" and made a part hereof.)

30. By the same April 13, 1987 letter, Dr. Pinhas was advised that the Midway Hospital Medical Executive Committee ("Midway Executive Committee") would convene to review and consider the action within 10 days.

31. On April 20, 1987 the Midway Executive Committee met. After an initial meeting from which Dr. Pinhas was excluded, the Executive Committee invited him into the meeting room and requested that Dr. Pinhas make a statement. Lacking sufficient notice, unprepared, confused and without benefit of legal or fellow staff advice, he

asked what the charges were, and was told that the letter of April 13, 1987 was self-explanatory. Thereafter, Dr. Pinhas attempted to reply briefly.

32. By letter dated April 20, 1987, the same date of that meeting, defendants Midway Hospital and Summit Health notified Dr. Pinhas that the Midway Executive Committee had upheld the summary suspension with the recommendation to terminate his staff privileges at Midway Hospital. He was also informed that the Midway Hospital Board of Directors had concurred with the Midway Executive Committee's recommendation. (A true and correct copy of the April 20, 1987 letter is attached hereto as Exhibit "C" and made a part hereof.)

33. In accordance with the Midway Hospital Medical Staff Bylaws ("Bylaws", a true and correct copy of the relevant portions of which are attached hereto as Exhibit "D" and made a part hereof), Dr. Pinhas requested a hearing by the Midway Hospital Judicial Review Committee ("Judicial Review Committee") by letter dated April 30, 1987. (A true and correct copy of the April 30, 1987 letter is attached hereto as Exhibit "E" and made a part hereof.)

34. In his April 30, 1987 letter, Dr. Pinhas made certain procedural and discovery requests, including the right to be represented by retained counsel, the right to full disclosure with sufficient particularity of all charges against him, the right to an impartial hearing officer, and the right to an unbiased, unprejudiced hearing panel.

35. On May 7, 1987 Dr. Pinhas received Midway Hospital's Notice of Hearing ("May 7, 1987 Notice") from defendants Midway Hospital and Summit Health, through defendant Mr. Feldman, scheduling the Judicial Review Committee's proceedings to commence on May 12,

1987. (A true and correct copy of the May 7, 1987 Notice is attached hereto as Exhibit "F" and made a part hereof.)

36. The May 7, 1987 Notice, according to the Bylaws, is also meant to serve the function of notifying a Respondent before the Judicial Review Committee of the charges that are being made against him. Those charges as contained in the May 7, 1987 Notice were rendered in broad, general terms. The Notice listed "specific charts" that the Hospital contended would support those charges. But the charts identified were not made available to Respondent as of the date of May 7, 1987 Notice. Approximately 128 charts were identified, though some appeared to be duplicates.

37. The May 7, 1987 Notice announced the appointment, by defendant Dr. Lurvey, of the members of the Judicial Review Committee and the appointment of the Hearing Officer, defendant Mr. Posell. All of the physicians who are included as members of the Judicial Review Committee are dependent upon the defendants Midway Hospital and Summit Health for their economic livelihood and professional activities. The members of the Judicial Review Committee, members of the defendant Medical Staff, together with defendants Summit Health, Midway Hospital, Dr. Lurvey, Mr. Feldman and Mr. Posell are represented by the same counsel, defendant W&A. W&A has represented the other defendants in connection with the preparation of the false and unjustified charges brought against plaintiff Dr. Pinhas.

38. The Judicial Review Committee, over the objection of Dr. Pinhas, included physicians who were and are in direct economic and professional competition with plaintiff Dr. Pinhas: John Hofbauer, M.D. and Stephen Seiff, M.D.

39. The May 7, 1987 Notice, in a summary fashion dismissed some of Dr. Pinhas' procedural and discovery requests, and stated that the Judicial Review Committee had unanimously voted not to permit Dr. Pinhas to be represented by an attorney at law at the hearing.

40. On May 9, 1987, Dr. Pinhas filed his Objections to the Notice of Hearing ("Objections"). (A true and correct copy of Dr. Pinhas' Objections is attached hereto as Exhibit "G" and made a part hereof.)

41. In his Objections, Dr. Pinhas contended that the May 7, 1987 Notice did not provide a reasonable quantum of time in which he could prepare, present, and have decided the preliminary Motions that he believed had to be resolved — with respect to procedure and substance — prior to the hearing of his matter. Moreover, Dr. Pinhas argued that without more specific information, and without possession and sufficient review and analysis of documentary evidence, the Judicial Review Committee hearing, as established and scheduled, contravened his rights under the United States and California Constitutions, the laws of the State of California, and the contractual obligations imposed upon defendant Midway Hospital and the defendant Medical Staff to fair notice and a rational and meaningful opportunity to be heard.

42. In his Objections, Dr. Pinhas requested that the Judicial Review Committee sustain those objections and dismiss the Notice of Hearing as totally defective.

43. On May 12, 1987, the administration of defendants Midway Hospital and Summit Health did not act upon the objection, but treated it as a request for a continuance and granted Dr. Pinhas a two week continuance, rescheduling the Judicial Review Committee hearing for May 26 and 27, 1987.

44. Because the May 7, 1987 Notice of Hearing named defendant Mr. Posell as the Hearing Officer, on May 8, 1987, Dr. Pinhas, through his counsel Lawrence Silver, sent Mr. Posell a letter requesting that he respond to certain questions in order that Dr. Pinhas could determine whether to file a challenge to Mr. Posell sitting as the Hearing Officer. (A true and correct copy of the May 8, 1987 letter is attached hereto as Exhibit "H" and made a part hereof.)

45. By letter ("Posell letter") dated May 11, 1987, Mr. Posell refused to respond to Dr. Pinhas' request. (A true and correct copy of the Posell letter is attached hereto as Exhibit "I" and made a part hereof.)

46. On May 14, 1987, Dr. Pinhas, through his counsel, filed 15 Motions with respect to procedural and discovery issues, including Motions regarding his request for representation by counsel and his request that Mr. Posell respond to certain voir dire questions in order to ascertain any bias, prejudice, or interest on Mr. Posell's part. (True and correct copies of these Motions are attached hereto as Exhibit "J" and made a part hereof.)

47. On information, knowledge and belief, plaintiff alleges that defendant Mr. Posell is biased and prejudiced against he and his counsel, Lawrence Silver, and that Mr. Posell and members of the law firm of which he is a partner, Shapiro, Posell & Close, serve as hearing officers at the request of defendant W&A in cases where W&A represents the hospital. There is a unity of interest between defendants W&A and Mr. Posell. Mr. Posell and his law firm are retained and continue to be retained as counsel to the Hospital because Mr. Posell ensures that Judicial Review Committees achieve the results that W&A and the clients of W&A desire. Mr. Posell and Shapiro, Posell & Close have an economic interest in the

outcome of the Peer Review Proceeding and had such an economic interest at the outset because his continued employment by defendant Summit Health, defendant Midway Hospital, defendant W&A and the defendant Kadzielski depends upon his continued rulings in favor of the defendant Midway Hospital's position and against physicians who are in the same position as Dr. Pinhas.

48. On May 18, 1987, Mr. Posell wrote to Dr. Pinhas' counsel and reiterated that the May 7, 1987 Notice advised Dr. Pinhas that the Judicial Review Committee had unanimously voted not to permit either Dr. Pinhas or the Medical Staff to be represented by an attorney at law at the hearing. Mr. Posell further stated that neither the Hearing Officer nor the Judicial Review Committee may consider Motions or requests made "in any phase of the hearing or appeal procedure by an attorney at law unless the Hearing Committee, in its discretion, permits both sides to be represented by legal counsel." Mr. Posell cited Bylaw Article VIII, Section 2(b), stating further that Dr. Pinhas' counsel's continued participation was a violation of that Bylaw. (A true and correct copy of Mr. Posell's May 18, 1987 letter is attached hereto as Exhibit "K" and made a part hereof.)

49. On May 19, 1987, Dr. Pinhas' counsel asked defendant Mr. Posell to recuse himself because of bias and prejudice and to answer three questions related to his ex parte communications with counsel for the defendant Midway Hospital, and for clarification of his ruling. (A true and correct copy of the letter to Mr. Posell dated May 19, 1987 is attached hereto as Exhibit "L" and made a part hereof.) Mr. Posell has not responded to that letter.

50. On May 19, 1987, Dr. Pinhas, appearing in propria persona, refiled the same 15 Motions respecting procedu-

ral and discovery matters, specifically including: the request to be represented by counsel; the request that the Hearing Officer respond to the voir dire questions submitted to him; the request for the full disclosure with particularity of the charges against him; and the request that Dr. Pinhas' motions be heard and decided at a reasonable time prior to the commencement of the hearing.

51. On May 21, 1987, defendant Mr. Posell denied nearly all of the Motions filed by Dr. Pinhas. (A true and correct copy of the letter from Mr. Posell dated May 21, 1987 is attached hereto as Exhibit "M" and made a part hereof.)

52. The alleged peer review hearings concerning Dr. Pinhas commenced on May 26 and proceeded for a total of six hearing sessions which were concluded on June 12, 1987.

53. During the course of the hearings, defendants Summit Health, Midway Hospital, the Medical Staff, Mr. Posell, Mr. Kadzielski, W&A, Dr. Perlman, Mr. Feldman, Dr. Lurvey and Ms. Farber, engaged in conduct to deprive plaintiff Dr. Pinhas of a fair hearing.

54. On information, knowledge and belief, plaintiff alleges that defendants Mr. Kadzielski and W&A, directly and indirectly, had improper ex parte communications with defendant Mr. Posell.

55. On information, knowledge and belief, plaintiff alleges that defendants Mr. Kadzielski and W&A, directly and indirectly, had improper ex parte communications with members of the Judicial Review Committee.

56. On information, knowledge and belief, plaintiff alleges that defendant Dr. Perlman had improper ex parte communications with members of the Judicial Review Committee.

57. On information, knowledge and belief, plaintiff alleges that defendants Dr. Lurvey, the Medical Staff, Summit Health, Midway Hospital had improper ex parte communications with members of the Judicial Review Committee.

58. On information, knowledge and belief, plaintiff alleges that defendant Mr. Posell had improper ex parte communications with members of the Judicial Review Committee.

59. Defendants Summit Health, Midway Hospital, Medical Staff and others sought to, and did in fact, intimidate witnesses Dr. Pinhas sought to call as witnesses in his defense of the case, including the threat of initiating Peer Review Proceedings against physicians who might testify on behalf of Dr. Pinhas.

60. Defendants Summit Health, Midway Hospital, Medical Staff, Ms. Farber and others sought to, and did in fact, intimidate witnesses Dr. Pinhas sought to call as witnesses in his defense of the case.

61. On June 1, 1987, at approximately 6:30 p.m., defendant Ms. Farber of Midway Hospital's Risk Management Section approached a table in the cafeteria where Marina Nino, Barbara Aviles, Rose Pierce and Suprani Watana, all of whom were employed by defendants Summit Health and Midway Hospital, were sitting while they were waiting to be called into the hearing regarding Dr. Pinhas' privileges. Ms. Farber said the following:

a. "I want to prepare you for what you are getting yourselves into."

b. "You don't have to do this."

c. "You can leave if you want to. You will not be persecuted or harassed if you leave."

d. "You are on your own, the hospital will not pay for your time."

e. "It is going to be like a court in there. There is a court stenographer. Everything you say will be taken down and under oath."

f. "You will each be called, one by one, you will not be allowed to go in as a group."

g. "You will be questioned in there by doctors, you will be cross-examined."

62. Shortly thereafter, Kay Deol, an administrator of defendant Midway Hospital and an employee of defendants Summit Health, Midway Hospital and Mr. Feldman, came over to the table and she and defendant Ms. Farber stayed around and hovered around the cafeteria for the rest of the evening. (True and correct copies of the declarations dated June 9, 1987 of Marina Nino and Barbara Aviles are attached hereto as Exhibit "N" and made a part hereof.)

63. Defendants Summit Health, Midway Hospital, Medical Staff, Mr. Kadzielski, W&A, Mr. Posell, Mr. Feldman, and Dr. Lurvey, precluded plaintiff Dr. Pinhas from examining two important witnesses, Mr. Feldman, the person who signed the charges against Dr. Pinhas and Dr. Lurvey, Chief of Staff who allegedly authorized the charges against Dr. Pinhas. Said defendants refused to produce Mr. Feldman and Dr. Lurvey as witnesses for cross-examination even though,

a. Mr. Feldman signed the charges,

b. Dr. Lurvey was listed in Exhibit "F", the charges, as a witness who would appear at the hearing, and

c. Dr. Pinhas and his representative repeatedly requested that they appear at the hearing and testify truthfully. (A true and correct copy of Dr. Pinhas' request to Dr. Lurvey and Mr. Feldman to appear are attached hereto as Exhibit "O" and made a part hereof.)

64. It is custom and practice in California that during the peer review proceeding, even if the Judicial Review Committee does not permit counsel to be present at the hearing, counsel is permitted to be on the grounds of the hospital to confer with his client during appropriate breaks in the proceeding.

65. Defendant Mr. Posell issued an order ordering counsel for Dr. Pinhas, who had been listed as a witness, excluded from the Hospital grounds during any portion of the hearing, while permitting counsel for the Hospital, Mr. Kadzielski and/or associates of W&A, not only to utilize hospital facilities, but also to communicate with the prosecutor, defendant Dr. Perlman.

66. Defendant Mr. Posell acted not only as Hearing Officer but also as counsel for defendant Midway Hospital and the Medical Staff, and ruled and continued to rule, without legal or factual justification, adversely to Dr. Pinhas.

67. Defendant Mr. Posell, acting as counsel for the Medical Staff, refused to allow Dr. Pinhas to have counsel.

68. Defendant Mr. Posell made rulings during the course of the entire proceeding to frustrate and interfere with plaintiff Dr. Pinhas' ability to defend against the charges brought against him.

69. Defendant Mr. Posell ruled that Dr. Pinhas' counsel's correspondence would not be answered, and yet

complied with all requests of defendants Mr. Kadzielski and W&A.

70. Defendant Mr. Posell intentionally ordered witnesses not to testify to the fact that defendant Dr. Macy and defendant Dr. Salz, who testified adversely to Dr. Pinhas at the hearing, also engaged in the same similar conduct with which Dr. Pinhas was charged. Mr. Posell precluded them from being identified by witnesses who were prepared to identify Dr. Macy and Dr. Salz to establish what the "standard in the community" was. Defendant Mr. Posell declined to permit Dr. Pinhas and his physician representative to have breaks and time to confer. In addition, Mr. Posell issued time requirements which were inherently unfair, and substantially prejudiced Dr. Pinhas. Mr. Posell, on the other hand, always considered and granted whatever requests were made by the prosecutor defendant Dr. Perlman.

71. Defendant Mr. Posell precluded testimony and evidence from being presented by Dr. Pinhas, and made hostile verbal comments to Dr. Pinhas, his physician representative and witnesses who appeared on behalf of Dr. Pinhas on and off the record made before the Judicial Review Committees.

72. Defendant Mr. Kadzielski and W&A retained, as they have done in the past, the services of Lacey Shorthand Reporting Service ("Lacey Reporters"), over whom they seek to exercise and do exercise control by reason of the substantial business they place with Lacey Reporters. Dr. Pinhas needed a copy of the transcript in order to adequately examine witnesses and prepare cross-examination. Plaintiff Dr. Pinhas, through counsel, ordered a copy of the transcript from Lacey Reporters on an expedited basis. Notwithstanding the order, defendant Mr. Kadzielski and W&A ordered Lacey Reporters not to produce the

transcript. On the same day as defendant Mr. Kadzielski and W&A issued their instructions to Lacey Reporters, counsel for Dr. Pinhas inquired how the preparation of the transcript was coming and was advised that Lacey Reporters could not produce a transcript in any timely fashion by which Dr. Pinhas could be able to use it for successive hearings. Upon information, knowledge and belief, plaintiff alleges that Lacey Reporters did so at the request of defendants Mr. Kadzielski and W&A. A day or so later Lacey Reporters agreed to produce the transcript, but not before the date that its utility for cross-examination would have passed and at a page rate of $12.00 per page.

73. Defendant Mr. Posell, after he heard from other defendants that plaintiff Dr. Pinhas, through counsel, was trying to secure a transcript, and while the hearing was pending, called Dr. Pinhas on the telephone. During that telephone conversation Mr. Posell called Dr. Pinhas a liar and threatened him by saying that Dr. Pinhas' attempts to get a copy of the transcript would cause him problems in the future.

74. On June 29, 1987 Dr. Pinhas received in the mail a document entitled "Report and Decision of the Judicial Review Committee ("Report and Decision") (a copy of the Report and Decision is attached hereto as Exhibit "P").

75. Upon information, knowledge and belief, plaintiff alleges that defendant Mr. Posell drafted the purported Report and Decision in an effort to protect defendants Summit Health, Midway Hospital, the Medical Staff, Dr. Lurvey, Mr. Feldman and himself from liability, and that such report was inconsistent with the findings and determinations of the Judicial Review Committee.

76. Although the alleged Report and Decision purports to bear the signature of the Chairman of the Judicial Review Committee, Ellis Berkowitz, M.D.; it does not. Plaintiff on information knowledge and belief alleges that this alleged Report and Decision is not reflective of the determination of that tribunal. Plaintiff on information knowledge and belief alleges that this alleged Report and Decision was signed by an agent of defendants Summit Health, Midway Hospital, the Medical Staff, Mr. Feldman and Dr. Lurvey, without the authorization of each member of the Judicial Review Committee.

77. On July 6, 1987 the defendant Medical Staff appealed the decision of the Judicial Review Committee to the Governing Board of defendant Midway Hospital (a copy of the appeal of Defendant Medical Staff is attached hereto and made a part hereof as Exhibit "Q").

78. On July 7, 1987 Plaintiff Dr. Pinhas appealed the purported decision of the Judicial Review Committee to the Governing Board of the Defendant Midway Hospital (a copy of the appeal of plaintiff Dr. Pinhas is attached hereto as Exhibit "R").

FIRST CLAIM FOR RELIEF

(For Declaratory Relief Against Defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Lurvey and BMQA Because They are Violating the Constitution of the United States by Enforcing and Participating in the Enforcement of Section 805 and 805.5 of the California Business and Professions Code and Section 423, et seq of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11133)

79. Plaintiff incorporates Paragraphs 1 through 78, inclusive, above by reference as though set forth in full herein.

80. Defendants, and each of them, are estopped from denying, that the actions which the defendants have taken, and the actions which are threatened by the defendants, have been done and are being done pursuant to and under authority of the laws of the State of California and the laws of the United States.

81. Defendants, and each of them, are estopped from denying that they have acted, claim to act, and threaten to continue to act, pursuant to, under the authority of, and within the protection of:

a. Section 70703, et seq., of the California Administrative Code;

b. Section 805 of the California Business and Professions Code;

c. Section 805.5 of the California Business and Professions Code;

d. Section 805.1 of the California Business and Professions Code;

e. Section 1094.5 of the California Code of Civil Procedure and the case law decided thereunder;

f. Sections 1156 and 1157 of the California Evidence Code;

g. Section 43.7 of the California Civil Code;

h. Other provisions of the laws of the State of California and the case law decided thereunder; and

i. Sections 423 et seq. of the Health Care Quality Improvements Act of 1986, 42 U.S.C. § 11133, et. seq.

82. To maintain licenses, health care facilities regularly must review privilege termination and restriction procedures to assure their conformity to applicable law. The California Administrative Code § 70703(a) requires that the Hospital "shall have an organized medical staff responsible to the governing body for the adequacy and quality of the medical care rendered to patients in the hospital." According to Title 22, California Administrative Code, § 70701(a)(1)(F), a Hospital must have a governing body which must adopt written bylaws, in accordance with legal requirements and its community, which shall include "self-government by the medical staff with respect to the professional work performed in the hospital . . . ." The governing body shall "assure that the medical staff bylaws, rules and regulations are subject to governing body approval . . . , and these bylaws shall include an effective formal means for the medical staff, as a liaison, to participate in the development of all hospital policy." *Id.* at (8), (9).

83. When a health care facility terminates or restricts the privileges of a physician, it must promptly report to the defendant BMQA all facts and circumstances that caused the termination or restraint pursuant to Section 805 of the California Business and Professions Code, which reads as follows:

> "*California Business and Professions Code §805*
>
> The chief executive officer and the chief of the medical staff, where one exists, of any health facility licensed pursuant to Division 2 (commencing with Section 1200), or any medical, psychological, dental or podiatric professional society, or medical specialty society described in Section 43.7 of the Civil Code, or any health care service plan or medical care foundation shall report to the agency which issued the

> license, certificate or similar authority when any licensed physician and surgeon, psychologist, podiatrist, or dentist is denied staff privileges, removed from the medical staff of the institution or if his or her staff or membership privileges are restricted for a cumulative total of 45 days in any calendar year for any medical disciplinary cause or reason. The reports shall be made within 20 working days following such removal or restriction, shall be certified as true and correct by the chief executive officer and the chief of the medical staff, where one exists, and shall contain a statement detailing the nature of the action, its date and all of the reasons for, and circumstances surrounding, the action. If the removal or restrictions is by resignation or other voluntary action that was requested or bargained for in lieu of medical disciplinary action, the report shall so state.
>
> The reporting required herein shall not act as a waiver of confidentiality of medical records and committee reports. The information reported or disclosed shall be kept confidential except as provided in subdivision (c) of Section 800, provided that a copy of the report containing the information required by this section may be disclosed as required by Section 805.5 with respect to reports received on or after January 1, 1976. The Board of Medical Quality Assurance, the Board of Osteopathic Examiners, and the Board of Dental Examiners shall disclose such reports as required by Section 805.5. A file containing reports received pursuant to this section shall be maintained by the agency receiving the reports for a minimum of five years after receipt.

No person shall incur any civil or criminal liability as the result of making any report required by this section.

Failure to make a report pursuant to this section shall be a misdemeanor punishable by a fine of not less than two hundred dollars ($200) nor more than one thousand two hundred dollars ($1,200)."

84. Pursuant to Section 805.5 of the California Business and Professions Code, hospitals are required to request from BMQA information regarding any adverse determination made pursuant to the peer review process contained in BMQA's records. The pertinent parts of Section 805.5 of the California Business and Professions Codes read as follows:

"*California Business and Professions Code § 805.5*

(a) Prior to granting or renewing staff privileges for any physician and surgeon, clinical psychologist, podiatrist, or dentist, any health facility licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code, or any health care service plan or medical care foundation, or the medical staff of any such institution, shall request a report from The Board of Medical Quality Assurance, the Board of Osteopathic Examiners, or the Board of Dental Examiners to determine if any report has been made pursuant to Section 805 indicating that the applying physician and surgeon, clinical psychologist, podiatrist, or dentist has been denied staff privileges, been removed from a medical staff, or had his staff privileges restricted as provided in Section 805. The request shall include the name and California license number of the physician and surgeon, clinical psychologist, podiatrist, or dentist. Furnishing of a copy of the 805 report shall not cause the 805 report to be a public record.

(b) Upon a request made by an institution described in subdivision (a) or its medical staff, which is received on or after January 1, 1980, the board shall furnish a copy of any report made pursuant to Section 805. However, the board shall not send a copy of a report where the denial, removal, or restriction was imposed solely because of the failure to complete medical records.

In the event that the board fails to advise such institution within 30 working days following its request for a report required by this section, the institution may grant or renew staff privileges for the physician and surgeon, clinical psychologist, podiatrist, or dentist.

(c) Any institution described in subdivision (a) or its medical staff which violates the provisions of subdivision (a) is guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars ($200) nor more than one thousand two hundred dollars ($1,200)."

85. California Business and Professions Code § 850.1 provides that the state licensing agency, defendant BMQA, is entitled to inspect and copy statements of charges, documents, medical charts or exhibits in evidence; and any opinion findings or conclusions relating to any disciplinary proceeding resulting in an action subject to § 805 of the Business and Professions Code reporting provisions.

86. A hospital's decision terminating and restricting privileges are judicially reviewable pursuant to Section 1094.5 of the California Code of Civil Procedure. (A copy

of the text of Section 1094.5 is attached hereto as Addendum "A".)

87. Peer review proceedings are confidential pursuant to California Evidence Code Sections 1156 and 1157. (A copy of the text of Sections 1156 and 1157 are attached hereto as Addendum "B".)

88. California provides immunity to participants in the peer review process pursuant to Section 43.7 of the California Civil Code. (A copy of the text of Section 43.7 is attached hereto as Addendum "C".)

89. Defendants are estopped from denying that they have been, are presently, and will be acting under color of authority of law and the protection afforded to them provided by the laws of the State of California and of the United States. All defendants are engaged in the enforcement and execution of the laws of the State of California, and more particularly, an alleged peer review process directed to plaintiff at defendant Midway Hospital. As a result of defendants' wrongful conduct, plaintiff has been deprived of his constitutionally protected rights.

90. Defendant BMQA is the "Board of Medical Examiners" as defined by the Health Care Quality Improvement Act of 1986, Section 423, et. seq. § 11133 which provides, in pertinent part:

"Sec. 423. REPORTING OF CERTAIN PROFESSIONAL REVIEW ACTIONS TAKEN BY HEALTH CARE ENTITIES[, 42 U.S.C. § 11133].

(a) REPORTING BY HEALTH CARE ENTITIES. —

(1) ON PHYSICIANS. — Each health care entity which —

(A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days;

* * *

(3) INFORMATION TO BE REPORTED. — The information to be reported under this subsection is —

(A) the name of the physician or practitioner involved,

(B) a description of the acts or omissions or other reasons for the action or, if known, for the surrender, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

(b) REPORTING BY BOARD OF MEDICAL EXAMINERS. — Each Board of Medical Examiners shall report, in accordance with section 424, the information reported to it under subsection (a) and known instances of a health care entity's failure to report information under subsection (a)(1).

* * *

Sec. 425. DUTY OF HOSPITALS TO OBTAIN INFORMATION, [42 U.S.C. § 11135].

(a) IN GENERAL. — It is the duty of each hospital to request from the Secretary (or the agency designated under section 424(b)), on and after the date information is first required to be reported under section 424(a)) —

(1) at the time a physician or licensed health care practitioner applies to be on the medical staff (courtesy or otherwise) of, or for clinical privileges at, the hospital, information reported under this part concerning the physician or practitioner, and

(2) once every 2 years information reported under this part concerning any physician or such practitioner who is on the medical staff (courtesy or otherwise) of, or has been granted clinical privileges at, the hospital.

A hospital may request such information at other times. Sec. 427. MISCELLANEOUS PROVISIONS[, 42 U.S.C. § 11137].

(a) PROVIDING LICENSING BOARDS AND OTHER HEALTH CARE ENTITIES WITH ACCESS TO INFORMATION. — The Secretary (or the agency designated under section 424(b)) shall, upon request, provide information reported under this part with respect to a physician or other licensed health care practitioner to State licensing boards, to hospitals, and to other health care entities (including health maintenance organizations) that have entered (or may be entering) into an employment or affiliation relationship with the physician or practitioner or to which the physician or practitioner has applied for clinical privileges or appointment to the medical staff.

* * *

(c) RELIEF FROM LIABILITY FOR REPORTING. — No person or entity shall be held liable in any civil action with respect to any report

made under this part without knowledge of the falsity of the information contained in the report.

(d) INTERPRETATION OF INFORMATION. — In interpreting information reported under this part, a payment in settlement of a medical malpractice action or claim shall not be construed as creating a presumption that medical malpractice has occurred."

91. Defendant BMQA is charged with the enforcement of the Health Care Quality Improvement Act of 1986, see Section 423, et. seq.

92. Defendant BMQA asserts that the following is required pursuant to Sections 805 of the California Business and Professions Code and pursuant to Section 423 of the Health Care Quality Improvements Act of 1986:

a. Defendant Midway Hospital, by its administrator, and defendant Dr. Lurvey, as Chief of Staff of Midway Hospital, are required pursuant to Section 805 of the California Business and Professions Code to submit a "Section 805 report" to it.

b. Defendant Midway Hospital is required, pursuant to Section 423 of the Health Care Quality Improvements Act of 1986, to make a "Section 423 report" to it.

c. Absent notice and an opportunity for hearing, the Section 805 report, or the contents thereof, shall, pursuant to Business and Professions Code Section 805.5, be distributed to (a) all health care facilities where plaintiff Dr. Pinhas has staff privileges, upon reappointment to the staff, and (b) all hospitals where Dr. Pinhas may apply for staff privileges.

d. Absent notice and an opportunity for hearing, the Section 423 report, or the contents thereof, shall, pursuant to Section 423 of the Health Care Quality Improvements Act of 1986, be distributed, within two years, to (a) all health care facilities where plaintiff Dr. Pinhas has staff privileges, upon reappointment to the staff, and (b) all hospitals where Dr. Pinhas may apply for staff privileges.

93. Defendants Summit Health, Midway Hospital, the Medical Staff, Mr. Feldman and Dr. Lurvey have threatened to file and continue to threaten to file a Section 805 report and a Section 423 report.

94. Defendant Midway Hospital's chief executive officer and defendant Dr. Lurvey may claim immunity of the content of the filing of a Section 805 report even if that content is incorrect, misleading or malicious pursuant to Section 805 of the Business and Professions Code.

95. Defendant Midway Hospital and defendant Dr. Lurvey may claim immunity of the content of the filing of a Section 423 report even if that content is incorrect, misleading or malicious pursuant to Section 427 of the Health Care Quality Improvements Act of 1986, 42 U.S.C. § 11137(c).

96. Dr. Pinhas has no control over the wording that is contained in the Section 805 report or Section 423 report from defendant Midway Hospital and defendant Dr. Lurvey.

97. The Section 805 report and the Section 423 report was, or will be, prepared and the wording was selected within the complete discretion of defendant Midway Hospital and defendant Dr. Lurvey.

98. Defendant Midway Hospital and defendant Dr. Lurvey are not required to submit, in advance, and do not

intend to submit, in advance of their filing it with BMQA, the form of Section 805 report or Section 423 report to Dr. Pinhas.

99. Defendant Midway Hospital and defendant Dr. Lurvey are not required to provide Dr. Pinhas, and will not provide Dr. Pinhas, with a copy of the Section 805 report or the Section 423 report after it has been filed with BMQA.

100. The Section 805 report and the Section 423 report or the content there of shall be distributed to other hospitals, physicians and others pursuant to the statute, regardless of the content of the reports.

101. Any receipt of the Section 805 report or Section 423 report, the maintenance of the Section 805 report or the Section 423 report, or the distribution of the Section 805 report or the Section 423 report, is done with the funds of the State of California, is done pursuant to the authority provided by the statutes of the State of California, more particularly, the California Business and Professions Code Sections 805 and 805.5 and the Health Care Quality improvements Act of 1986. The obligation of hospitals, to secure information contained in the Section 805 report or Section 423 reports for physicians whose staff privileges are being renewed or who seek staff privileges, is compelled and criminal sanctions may apply to those who do not, pursuant to the laws of the State of California, more particularly the California Business and Professions Code Sections 805 and 805.5 and the Health Care Quality Improvements Act of 1986.

102. It is common practice in California, for every hospital who seeks appointment or reappointment of a physician to the medical staff, to require that the physician disclose whether or not they have had medical staff

privileges suspended, terminated, or any action taken thereon.

103. It is common practice in California for hospitals, after the decision in *Elam v. College Park Hospital,* 132 Cal.App.3d 332, 183 Cal.Rptr. 156 (1982) to preclude admission to the hospital staff if a physician has a report that in any way casts any doubt on his competency to practice medicine or engages in any conduct which may adversely affect patient care.

104. Plaintiff Pinhas contends and seeks the declaration of this Court that § 805 and § 805.5 of the Business and Professions Code of the State of California as interpreted and implemented by the acts of the defendants, including defendant BMQA, violates the Constitution of the United States and more particularly the 14th and 5th Amendments thereto in that Dr. Pinhas' rights to due process of law, the equal protection of the laws and his rights to privacy secured to him by the Constitution of the United States are violated.

105. Defendants contend and seek a declaration to the contrary.

106. Plaintiff Pinhas contends and seeks a declaration of this Court that Section 423 et. seq. of the Health Care Quality Improvements Act of 1986 violates the Constitution of the United States and more particularly the 5th Amendment thereto in that Dr. Pinhas' rights to due process of law, the equal protection of the laws and his rights to privacy secured to him by the Constitution of the United States are violated.

107. Defendants contend and seek a declaration to the contrary.

108. It is necessary and appropriate that this dispute between plaintiff Dr. Pinhas and defendants be adjudicated and determined promptly, so that the parties to this litigation may know their rights and obligations under the laws and Constitution of the United States and because failure to determine this dispute will result in irreparable injury to Dr. Pinhas.

SECOND CLAIM FOR RELIEF

(For Damages for Violations of Plaintiff's Constitutional Rights and the Civil Rights Act, 42 U.S.C. § 1983 by Defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Mr. Posell, Dr. Macy, Dr. Salz, Dr. Perlman, Ms. Farber, Mr. Kadzielski, W&A, and Each of Them)

109. Plaintiff incorporates Paragraphs 1 through 78 and 80 through 103, inclusive, above by reference as though set forth in full herein.

110. Dr. Pinhas has been summarily, knowlingly, and intentionally deprived of the status and his property interest in membership on Midway Hospital's medical staff, including admitting and surgical privileges at Midway Hospital, without prior notice or an opportunity to be heard.

111. By virtue of the unjustified and unlawful Peer Review Proceeding which has been commenced and is continuing to be prosecuted against Dr. Pinhas, defendants and each of them have been, are presently, and will be acting under the color of authority and law of the State of California and of the United States. Defendants and each of them claim that they are engaged in the enforcement and execution of the laws of the State of California and the peer review process. Under such circumstances, Dr. Pinhas is entitled to due process rights under the United States Constitution.

112. Defendants, and each of them, by denying Dr. Pinhas representation by counsel, full disclosure with particularity of the charges against Dr. Pinhas and by refusing to take action on plaintiff's request that Dr. Pinhas' Motions be heard and decided at a reasonable time prior to the commencement of the hearing, are acting in contravention of procedures required by due process. Further, defendants and each of them, by denying plaintiff his right to an unbiased, unprejudiced, detached hearing officer, and by appointing the Judicial Review Committee that consists of members who are in active economic and professional competition with plaintiff and of defendant's own medical staff and subject to the control, persuasion and undue influence of defendants, is further depriving defendant of a fair opportunity to be heard as guaranteed to him by the due process and equal protection clauses of the Constitution of the United States. Further, improper ex parte communications between counsel for the Medical Staff, the hearing officer, the Judicial Review Committee members, the prosecutor, and officers of the Hospital deny plaintiff a fair hearing consistent with due process. Further, defendants' intimidation of witnesses, depriving witnesses of the plaintiff from attending the hearing, threatening plaintiff's counsel with arrest and ordering him off Hospital grounds during the hearing — even though he was listed as a witness, ordering witnesses not to testify to facts helpful to plaintiff Dr. Pinhas, vilifying plaintiff, his physician representative, his witnesses, and interfering with plaintiff's ability to timely get a copy of the transcript of proceedings deprive plaintiff of due process of law.

113. Based on the conduct of defendants, and each of them, as set forth above, Dr. Pinhas has been deprived of his rights in violation of the 5th and the 14th Amendments and Due Process and Equal Protection Clauses of

the United States Constitution together with his constitutional right to privacy and has been and will continue to suffer damages in an amount to be determined at the trial of this matter, but in excess of the jurisdictional limits of this Court.

114. As a result of the conduct of defendants and each of them, plaintiff is entitled to reasonable attorneys fees, pursuant to 42 U.S.C. § 1988.

THIRD CLAIM FOR RELIEF

(For Damages for Violations of the Constitution of the United States and the Civil Rights Act 42 U.S.C. § 1985(3) by Defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Mr. Posell, Dr. Macy, Dr. Salz, Dr. Perlman, Ms. Farber, Mr. Kadzielski, W&A, and Each of Them)

115. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 78, 80 through 103 and 110 inclusive, of this First Amended Complaint.

116. Defendants, and each of them, have conspired to deprive plaintiff of equal protection under the laws and of equal privileges and immunities under the laws. In furtherance of this conspiracy, defendants, and each of them, have denied Dr. Pinhas representation by counsel, full disclosure with particularity of the charges against Dr. Pinhas and denied plaintiff's request that Dr. Pinhas' Motions be heard and decided at a reasonable time prior to the commencement of the hearing, and have acted in contravention of procedures required by due process. Further, defendants and each of them, have denied plaintiff his right to an unbiased, unprejudiced, detached hearing officer, and by appointing the Judicial Review Committee that consists of members who are in active

economic and professional competition with plaintiff and of defendant's own medical staff and subject to the control, persuasion and undue influence of defendants, has further deprived defendant of a fair opportunity to be heard as guaranteed to him by the due process and equal protection clauses of the Constitution of the United States. Further, improper ex parte communications between counsel for the Medical Staff, the hearing officer, the Judicial Review Committee members, the prosecutor, and officers of the Hospital have denied plaintiff a fair hearing consistent with due process. Further, defendants' intimidation of witnesses, depriving witnesses of the plaintiff from attending the hearing, threatening plaintiff's counsel with arrest and ordering him off Hospital grounds during the hearing — even though he was listed as a witness, ordering witnesses not to testify to facts helpful to plaintiff Dr. Pinhas, vilifying plaintiff, his physician representative, his witnesses on and off the record before the Judicial Review Committee, and interfering with plaintiff's ability to timely get a copy of the transcript of proceedings has deprived plaintiff of due process of law.

117. As a result of the conduct of defendants, and each of them, plaintiff has suffered property damage to his medical practice, and has suffered the deprivation of his property interest in membership on the Midway Hospital's medical staff, including admitting and surgical privileges, at Midway Hospital. As a consequence, plaintiff has been deprived of his rights in violation of the 5th and 14th Amendments and Due Process and Equal Protections Clauses of the United States Constitution together with the constitutionally protected right of privacy.

118. As a result of the conduct of defendants, and each of them, plaintiff has been damaged in an amount to be determined at the time of trial, but in an amount in excess of the jurisdictional limits of this Court.

119. As a result of the conduct of defendants, and each of them, plaintiff is entitled to reasonable attorneys fees, pursuant to 42 U.S.C. § 1988 of the Civil Rights Act.

FOURTH CLAIM FOR RELIEF

(Treble Damages for Violation of the Sherman Anti-Trust Act, Section 1, 15 U.S.C. § 1 by defendants Summit Health, Midway Hospital, the Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz, Dr. Perlman, Mr. Kadzielski, W&A and Each of Them)

120. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 78, 80, 84, 90, 91, 93 through 103, and 112, inclusive, of the First Amended Complaint.

121. Defendants Dr. Reader, Dr. Macy, Dr. Salz, Dr. Perlman, and others are engaged in the practice of medicine limited to eye medicine and ophthalmologic surgery and are in competition with plaintiff Dr. Pinhas.

122. Defendants are seeking to effectuate a boycott and drive Dr. Pinhas out of business so that other ophthalmologists and eye physicians, including, but not limited to, defendants Dr. Reader, Dr. Macy, Dr. Salz and Dr. Perlman, will have a greater share of the eye care and ophthalmic surgery in Los Angeles.

123. In an effort to effectuate the boycott and to boycott plaintiff Dr. Pinhas, defendants Dr. Reader, Dr. Macy, Dr. Salz, Dr. Perlman, and others, including, but not limited to, Dr. Lurvey have sought to control and do control defendant Medical Staff. Defendant Mr. Feldman

controls Summit Health insofar as it relates to Dr. Pinhas and Midway Hospital.

124. After Dr. Pinhas refused to accept the terms and conditions of the "sham" contract and refused to return a copy of it to Midway Hospital, and after defendant Dr. Lurvey threatened that proceedings may be instituted against him in the event that he sought to utilize this Exhibit "A" in any way detrimental to Midway Hospital, in late March, 1987 Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz, and Dr. Perlman entered into a combination and conspiracy to retaliate against Dr. Pinhas and to preclude him from continued competition in the market place, not only at defendant Midway Hospital, but by reason of the filing of an improper Section 805 report and a Section 423 report, preclude plaintiff Pinhas from practicing medicine in California, if not the United States. In furtherance of the conspiracy of defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz, and Dr. Pearlman, defendants enlisted the assistance and received the assistance of Mr. Posell, Mr. Kadzielski, and W&A to create unjustified charges, to secure adverse determinations against plaintiff Dr. Pinhas, to cause a summary suspension and termination of his privileges at Midway Hospital and report that summary suspension and termination to the defendant BMQA, and causing dissemination of that adverse determination to all hospitals which Dr. Pinhas is a member, and to all hospitals to which he may apply so as to secure similar actions by those hospitals, thus effectuating a boycott of Dr. Pinhas.

125. Without admission to other hospitals, plaintiff Pinhas has no method by which he can practice

ophthalmic surgery, which constitutes the greater portion of his practice.

126. The actions undertaken by defendants in connection with the bringing of false charges against Dr. Pinhas were done with oppression and malice and:

a. Were not done in a reasonable belief that the action was in furtherance of the quality of health care;

b. Were not done after a reasonable effort to obtain the facts of the matter;

c. Were not done after adequate notice and hearing procedures afforded to Dr. Pinhas, and utilized procedures which were not fair under the circumstances; and

d. Were not based upon the reasonable belief that the action was warranted by the facts after defendants' efforts to obtain facts.

FIFTH CLAIM FOR RELIEF
(Injunctive Relief Against All Defendants)

127. Plaintiff realleges and incorporates herein by reference all of the allegations of this First Amended Complaint.

128. Defendants, and each of them, threatened to, and unless restrained will, continue to deprive plaintiff Dr. Pinhas of his right to due process and fair procedure under both the United States Constitution and the Constitution of the State of California.

129. Defendants' conduct has caused, and will continue to cause, plaintiff great and irreparable injury, including, but not limited to, the injury which resulted in

the filing of a California Business and Professions Code Section 805.5 notice for which pecuniary damages would not afford adequate relief, in that they would not completely compensate plaintiff's professional reputation and good standing, and would be extremely difficult to ascertain.

WHEREFORE, plaintiff requests judgment to be entered for plaintiff and against defendants, and each of them, as follows:

1. On the First Claim for Relief, for a declaratory judgment that Sections 805 and 805.5 of the California Business and Professions Code and Section 423 et seq of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11133 et seq., are unconstitutional, together with costs of suit incurred herein, including reasonable attorneys fees pursuant to 42 U.S.C. § 1988, and for such other and further relief as the Court deems just and proper.

2. On the Second Claim for Relief, for damages according to proof, for costs of suit incurred herein, including reasonable attorneys fees pursuant to 42 U.S.C. § 1988, and for such other and further relief as the Court deems just and proper.

3. On the Third Claim for Relief, for damages according to proof, for costs of suit incurred herein, including reasonable attorneys fees pursuant to 42 U.S.C. § 1988, and for such other and further relief as the Court deems just and proper.

4. On the Fourth Claim for Relief, for damages according to proof and then trebled, and for costs of suit incurred herein, including reasonable attorneys fees as allowed by law, and for such other and further relief as the Court deems just and proper.

5. On all Claims for Relief an injunction, preliminary, and final, against each and all defendants, their agents, assistants, successors, employees, attorneys, representatives, and all persons acting in concert or cooperation with them or at their direction from violating the right of plaintiff.

JURY TRIAL DEMAND

1. Plaintiff hereby demands trial by jury herein.

DATED: July 13, 1987

LAWRENCE SILVER
A Law Corporation

By: LAWRENCE SILVER
Attorneys for Plaintiff
Simon J. Pinhas, M.D.

CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 1094.5

"(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner. Where the petitioner has proceeded pursuant to Section 68511.3 of the Government Code and the Rules of Court implementing that section and where the transcript is necessary to a proper review of the administrative proceedings, the cost of preparing the transcript shall be borne by the respondent. Where the party seeking the writ has proceeded pursuant to * * * Section 1088.5, the administrative record shall be filed as expeditiously as possible, and may be filed with the petition, or by the respondent after payment of the costs by the petitioner, where required, or as otherwise directed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has

not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in case in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) Notwithstanding * * * subdivision (c), in cases arising from private hospital boards or boards of directors of districts organized pursuant to The Local Hospital District Law, Division 23 (commencing with Section 32000) of the Health and Safty Code, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record. However, in all cases in which the petition alleges discriminatory actions prohibited by Section 1316 of the Health and Safety Code, and the plaintiff makes a preliminary showing of substantial evidence in support of that allegation, the court shall exercise its independent judgment on the evidence and abuse of discretion shall be established if the court determines that the finding are not supported by the weight of the evidence.

(e) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) * * * remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise

its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case.

(f) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

(g) Except as provided in subdivision (h), the court in which proceedings under this section are instituted may stay the operation of the adminstrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing the notice, whichever occurs first. However, no such stay shall be imposed or continued in the court is satisfied that it is against the public interest; provided that the application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2. If an appeal is taken from a denial of the writ, the appeal is taken. However, in cases where a stay is in effect at the time of filing the notice f appeal, the stay shall be continued by operation of law for a period of 20 days from the filing of the notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which the appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect, the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of the proceedings.

(h)(1) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision of any licansed hospital or any state agency made after a hearing required by statute to be conducted under the provisions of the Administrative Procedure Act, as set forth in Chapter 5 (commencing with Section 115000) of Part 1 of Division 3 of Title 2 of the Government Code, conducted by the agency itself or an administrative law judge on the staff of the Office of Administrative Hearings pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing the notice, whichever occurs first. However, the stay shall not be imposed or continued unless the court is satisfied that the public interest will not suffer and that the licensed hospital or agency is unlikely to prevail ultimately on the merits; and provided further that the application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(2) The standard set forth in this subdivision for obtaining a stay shall apply to any administrative order or decision of an agency which issued licenses pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code or pursuant to the Osteopathic

Initiative Act or the Chiropractic Initiative Act. With respect to orders or decisions of other state agencies, the standard in this subdivision shall apply only when the agency has adopted the proposed decision of the administrative law judge in its entirety or has adopted the proposed decision but reduced the proposed penalty pursuant to subdivision (b) of Section 11517 of the Government Code; otherwise the standard in subdivision (g) shall apply.

(3) If an appeal is taken from a denial of the writ, the order or decision of the hospital or agency shall not be stayed except upon the order to which the appeal is taken. However, in cases where a stay is in effect at the time of filing the notice of appeal, the stay shall be continued by operation of law for a period of 20 days from the filing of the notice. If an appeal is taken from the operation of law for a period of 20 days from the filing of the notice. If an appeal is taken from the granting of the writ, the order or decision of the hospital or agency is stayed pending the granting of the writ, the order or decision of the hospital or agency is stayed pending the determination of the appeal unless the court to which the appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect, the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of the proceedings."

CALIFORNIA EVIDENCE CODE SECTIONS 1156 AND 1157

"§ 1156. (a) In-hospital medical or medical-dental staff committees of a licensed hospital may engage in research and medical or dental study for the purpose of reducing morbidity or mortality, and may make findings and recommendations relating to such purpose. Except as provided in subdivision (b), the written records of interviews, reports, statements, or memoranda of such in-hospital medical or medical-dental staff committees relating to such medical or dental studies are subject to Sections 2016 to 2036, inclusive, of the Code of Civil Procedure (relating to discovery proceedings) but, subject to subdivisions (c) and (d), shall not be admitted as evidence in any action or before any administrative body, agency, or person.

(b) The disclosure, with or without the consent of the patient, of information concerning him to such in-hospital medical or medical-dental staff committee does not make unprivileged any information that would otherwise be privileged under Section 994 or 1014; but, notwithstanding Sections 994 and 1014, such information is subject to discovery under subdivision (a) except that the identity of any patient may not be discovered under subdivision (a) unless the patient consents to such disclosure.

(c) This section does not affect the admissibility in evidence of the original medical or dental records of any patient.

(d) This section does not exclude evidence which is relevant evidence in a criminal action."

ADDENDUM "B"

§ 1157. Proceedings and records of medical, medical-dental, podiatric, registered dietitian, psychological or veterinary staff review committees; local medical, dental, dental hygienist, podiatric, dietetic, veterinary, chiropractic society, or state or local psychological review committees.

(a) Neither the proceedings nor the records or organized committees of medical, medical-dental, podiatric, registered dietitian, psychological or veterinary staffs in hospitals having the responsibility of evaluation and improvement of the quality of care rendered in the hospital, or medical or dental review or dental hygienist review or chiropractic review or podiatric review or registered dietitian review or veterinary review committees of local medical, dental, dental hygienist, podiatric, dietetic, veterinary, or chiropractic societies, or psychological review committees of state or local psychological associations or societies having the responsibility of evaluation and improvement of the quality of care, shall be subject to discovery.

(b) Except as hereinafter provided, no person in attendance at a meeting of any of those committees shall be required to testify as to what transpired at that meeting.

(c) The prohibition relating to discovery or testimony does not apply to the statements made by any person in attendance at * * * a meeting of any of those committees who is a party to an action or proceeding the subject matter of which was reviewed at that meeting, or to any person requesting hospital staff privileges, or in any action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits.

(d) The prohibitions * * * in this section do not apply to medical, dental, dental hygienist, podiatric, dietetic, psychological, veterinary or chiropractic society committees that exceed 10 percent of the membership of the society, nor to any of those committees if any person serves upon the committee when his or her own conduct of practice is being reviewed.

(e) The amendments made to this section by Chapter 1081 of the Statutes of 1983, or at the 1985 portion of the 1985-86 Regular Session of the Legislature, do not exclude the discovery or use of relevant evidence in a criminal action."

CALIFORNIA CIVIL CODE SECTION 43.7

"(b) There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any professional society, any member of a duly appointed committee of a medical specialty society, or any member of a duly appointed committee of a state or local professional society, or duly appointed member of a committee of a professional staff of a licensed hospital (provided the professional staff operates pursuant to written bylaws that have been approved by the governing board of the hospital), for any act or proceeding undertaken or performed within the scope of the functions of any such committee which is formed to maintain the professional standards of the society established by its bylaws, or any member of any peer review committee whose purpose is to review the quality of medical, dental, dietetic, chiropractic, optometric, or veterinary services rendered by physicians and surgeons, dentists, dental hygienists, podiatrists, registered dietitians, chiropractors, optometrists, veterinarians, or psychologists which committee is composed chiefly of physicians and surgeons, dentists, dental hygienists, podiatrists, registered dietitians, chiropractors, optometrists, veterinarians, or psychologists for any act or proceeding undertaken or performed in reviewing the quality of medical, dental, dietetic, chiropractic, optometric, or veterinary services rendered by physicians and surgeons, dentists, dental hygienists, podiatrists, registered dietitians, chiropractors, optometrists, veterinarians, or psychologists or any member of the governing board of a hospital in reviewing the quality of medical services rendered by members of the staff if such professional society, committee, or board member acts without malice, has made a reasonable effort to obtain the facts of

the matter as to which he, she, or it acts, and acts in reasonable belief that the action taken by him, her, or it is warranted by the facts known to him, her, or it after such reasonable effort to obtain facts. 'Professional society' includes legal, medical, psychological, dental, dental hygiene, dietetic, accounting, optometric, podiatric, pharmaceutic, chiropractic, physical therapist, veterinary, licensed marriage, family, and child counseling, licensed clinical social work, and engineering organizations having as members at least a majority of the eligible persons or licentiates in the geographic area served by the particular society.

'Medical specialty society' means an organization having as members at least 25% of the eligible physicians within a given professionally recognized medical specialty in the geographic area served by the particular society.

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(d) There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any physician and surgeon, podiatrist, chiropractor, or attorney who is a member of an underwriting committee of an interindemnity or reciprocal or interinsurance exchange or mutual company for any act or proceeding undertaken or performed in evaluating physicians and surgeons, podiatrists, chiropractors, or attorneys for the writing of professional liability insurance, or any act or proceeding undertaken or performed in evaluating physicians and surgeons or attorneys for the writing of an interindemnity, reciprocal, or interinsurance contract as specified in Section 1280.7 of the Insurance Code, if the evaluating physician and surgeon, podiatrist, chiropractor, or attorney acts without malice, has made a reasonable effort to obtain the facts of the matter as to which he

or she acts, and acts in reasonable belief that the action taken by him or her is warranted by the facts known to him or her after reasonable effort to obtain the facts.

(e) This section shall not be construed to confer immunity from liability on any quality assurance committee established in compliance with Section 4070 and 5624 of the Welfare and Institutions Code or hospital. In any case in which, but for the enactment of the preceding provisions of this section, a cause of action would arise against a quality assurance committee established in compliance with Sections 4070 and 5624 of the Welfare and Institutions Code or hospital, such cause of action shall exist as if the preceding provisions of this section had not been enacted."

[SUMMIT HEALTH LTD. LETTERHEAD DELETED]

CONFIDENTIAL

January 26, 1987

Simon Pinhas, M.D.
9033 Wilshire Boulevard, Suite 206
Beverly Hills, CA 90211

Dear Dr. Pinhas:

It is our pleasure to submit this letter to you as a result of our negotiations, representing the understanding and agreements made between Midway Hospital Medical Center (hereafter referred to as "Hospital") and Simon Pinhas, M.D. (hereafter referred to as "Doctor"). When our respective duly authorized signatures are affixed hereto, the terms of this Agreement shall become binding upon Hospital and Doctor for the period specified.

Doctor shall apply for, obtain and maintain medical staff membership and privileges at Hospital appropriate to the conduct of his practice during the term of this Agreement. Such membership (or temporary membership pending completion of staff application requirements), is to be obtained prior to January 1, 1987.

Doctor shall at all times be and act as an independent contractor with respect to all duties and obligations devolving upon him under this Agreement. Hospital shall neither have nor exercise any control over the methods by which Doctor performs his work. The sole interest and responsibility of Hospital with respect to the manner in which Doctor performs his work is to assure that the quality of care is provided in a competent, efficient and

satisfactory manner in accordance with the standards of medical practice in the State of California. Doctor agrees that the standards observed in his medical practice and related activities shall be subject to the bylaws, rules and regulations applying to the medical staff of the Hospital and to the peer review functions of the medical staff and review functions of the Hospital's Board of Directors. Doctor shall comply with all applicable provisions of law and other rules and regulations of any and all governmental authorities relating to ensure and regulation of physician and hospitals.

Doctor agrees to accept the appointment as Summit Nursing Home Liaison with the following duties and responsibilities concurrent with the position.

1. To act as Summit Nursing Home Liaison at the Hospital.

2. To offer in-service educational programs to Hospital staff as appropriate and requested by the in-service Coordinator of the Hospital.

3. To provide at least one continuing medical education program to the general staff bi-annually.

4. To submit quarterly reports to Hospital Administration concerning the progress and development of the Summit Nursing Home Liaison at the Hospital.

5. To offer professional guidance to Hospital Administration for the selection of appropriate capital equipment purchases for the Summit Nursing Home Liaison Program.

6. To inform Hospital of any new advances in the care and treatment of Ophthalmology patients as appropriate.

7. To participate in quality of care studies as may be requested by the Hospital Quality Assurance Committee.

In consideration for the administrative, educational and related services required of and provided by Doctor and in consideration for his abiding by all other provisions of this Agreement, Hospital will compensate Doctor at the rate of $3,000.00 per month for the period of January 1, 1987 through January 1, 1988 for a total of $36,000 for the twelve-month period.

Because Hospital has entered into this Agreement in reliance on the personal abilities of Doctor, he may not assign any of his rights or delegate any of his duties arising under this Agreement.

This Agreement shall be terminable by either party, without cause, upon thirty (30) days written notice. In the event of termination, payments owed to Doctor pursuant to this Agreement, if any, will be prorated.

This Agreement shall terminate twelve months after the date of January 1, 1987, unless sooner terminated with notice as provided above, or unless terminated by Hospital, without notice, in any of the following events:

(a) If Doctor ceases to be duly licensed and authorized to practice medicine and surgery in California; or

(b) If Doctor fails to maintain membership on the Medical Staff of the Hospital; or

(c) If Doctor fails to appropriately carry out his duties and responsibilities as Summit Nursing Home Liaison.

We hope that these understandings and agreements are in accord with our negotiations and are acceptable to you.

If this Agreement meets with your approval, please sign on the line provided below and return for final execution.

Sincerely,
MIDWAY HOSPITAL MEDICAL CENTER

By: _____
Philip H. Conen
Executive Director
("Hospital")

Accepted by:

_____
Simon Pinhas, M.D.
("Doctor")

[MIDWAY HOSPITAL MEDICAL CENTER LETTERHEAD DELETED]

April 13, 1987

Simon Pinhas, MD
9033 Wilshire Blvd. #206
Beverly Hills, CA 90211

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Dear Doctor Pinhas:

In accordance with the Bylaws of the Medical Staff of Midway Hospital Medical Center, Article VII, Section 2, you are hereby advised of the Summary Suspension of all your medical staff privileges; including admitting and surgical.

This suspension shall become effective on April 13, 1987, at 3:00 p.m. The Medical Executive Committee of Midway Hospital Medical Center shall convene to review and consider this action within 10 days as specified in the Bylaws.

This is a result of Medical Staff review of your medical records, with consideration as to the questions raised regarding: indications for surgery; appropriateness of surgical procedures in light of patient's medical condition; adequacy of documentation in medical records; and ongoing pattern of identified problems.

EXHIBIT "B"

A copy of Article VII and Article VIII are enclosed for your information.

Sincerely,

Arthur N. Lurvey, MD
Chief of Staff

Mitchell Feldman
Regional Vice-President

[MIDWAY HOSPITAL MEDICAL CENTER LETTERHEAD DELETED]

April 20, 1987

Simon Pinhas, MD
9033 Wilshire Blvd. #206
Beverly Hills, CA 90211

HAND DELIVERED AND BY
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Dear Doctor Pinhas:

Thank you for your statements at the Medical Executive Committee meeting held on April 17, 1987.

Please be advised that the Medical Executive Committee has reviewed and considered the action taken and upheld the summary suspension with a recommendation to terminate your medical staff privileges at Midway Hospital Medical Center. The Board of Directors of Midway Hospital Medical Center has concurred with their recommendation.

Pursuant to the Medical Staff Bylaws, Article VIII, you are entitled to a hearing as outlined in Section 1.a. You have ten days from the date of receipt of this letter to request a hearing by a Judicial Review Committee. Said request shall be by written notice send by certified mail to the Chief Executive Director of the Hospital. If you fail to request a hearing within the specified time frames the recommended action shall become effective immediately.

EXHIBIT "C"

Enclosed is a copy of Article VIII. Please be advised, per the letter dated April 13, 1987, that summary suspension of all privileges includes admitting and surgical privileges.

Sincerely,

Arthur N. Lurvey, MD
Chief of Staff

MIDWAY HOSPITAL MEDICAL CENTER
MEDICAL STAFF BYLAWS

PREAMBLE

WHEREAS, Midway Hospital Medical Center is an investor-owned Hospital organized under the laws of the State of California; and

WHEREAS, its purpose is to serve as a general acute care hospital providing patient care, education, and research; and

WHEREAS, it is recognized that one of the aims and goals of the medical staff is to strive for quality patient care in the hospital, that the medical staff must work with and is subject to the ultimate authority of the board, and that the cooperative efforts of the medical staff, administration, and board are necessary to fulfill the hospital's aims and goals in providing quality care to its patients; and

THEREFORE, the physicians, dentists, and podiatrists practicing in this hospital hereby organize themselves into a medical staff in conformity with these bylaws.

DEFINITIONS

1. HOSPITAL means Midway Hospital Medical Center of Los Angeles, California.

2. BOARD OF DIRECTORS or BOARD means the governing body of the corporation.

3. EXECUTIVE DIRECTOR is the Chief Executive Officer of the Hospital designated by the Board of Directors to be responsible for all aspects of the hospital

operations, including medical staff liaison and coordination. In the absence of the EXECUTIVE DIRECTOR, the Associate Executive Director shall assume all the responsibilities of the Executive Director.

4. MEDICAL STAFF means the formal organization of all licensed physicians, dentists and podiatrists who are privileged to attend patients in the hospital.

5. MEDICAL EXECUTIVE COMMITTEE or MEC means the executive committee of the medical staff.

6. CLINICAL PRIVILEGES or PRIVILEGES means the permission granted to a practitioner to render specific diagnostic, therapeutic, medical, dental, podiatric, or surgical services.

7. PHYSICIAN means any individual with an M.D. or D.O. degree who is fully licensed to practice medicine in all its phases.

8. PRACTITIONER means, unless otherwise expressly limited, any physician, dentist, or podiatrist applying for, or exercising clinical privileges in this hospital.

9. SPECIFIED PROFESSIONAL PERSONNEL means an individual, other than a licensed physician, dentist, or podiatrist, who exercises independent judgment within the areas of his professional competence and who is qualified to render direct or indirect medical, dental, podiatric, or surgical care under the supervision of a practitioner who has been accorded privileges to provide such care in the hospital.

10. MEDICAL STAFF YEAR means the period from January 1st to December 31st.

11. EX OFFICIO means service as a member of a body by virtue of an office or position held and, unless

otherwise expressly provided, means without voting rights.

12. SPECIAL NOTICE means written notification sent by certified or registered mail, return receipt requested.

13. MEDICO-ADMINISTRATIVE OFFICER means a practitioner engaged by the hospital on a full-time or part-time basis to perform duties which, although partially administrative, include clinical responsibilities.

14. As used in the Bylaws, the masculine gender includes both masculine and feminine.

ARTICLE I

NAME

The name of this organization shall be Medical Staff of Midway Hospital Medical Center.

ARTICLE VIII

HEARING AND APPEAL PROCEDURES

Section 1. REQUEST FOR HEARING

a. Notice of Decision

In all cases in which a practitioner is entitled to a hearing as set forth herein, he shall have ten (10) days following the date of receipt of written notice of the action giving rise to the right to the hearing, sent registered or certified mail, within which to request a hearing by a judicial review committee hereinafter referred to. Said request shall be by written notice sent certified or registered mail to the Chief Executive Officer. In the event the applicant member does not request a hearing

within the time and in the manner hereinabove set forth, he shall be deemed to have waived his right to a hearing and to any appellate review to which he might otherwise have been entitled and to have accepted the action involved, and it shall thereupon become effective immediately.

b. Grounds for Hearing

Any one or more of the following actions shall constitute grounds for a hearing:

(1) Denial of medical staff membership;

(2) Denial of requested advancement in medical staff membership;

(3) Denial of medical staff reappointment;

(4) Demotion to lower staff reappointment;

(5) Suspension to lower staff category;

(6) Expulsion from medical staff membership;

(7) Denial of requested privileges;

(8) Reduction in privileges;

(9) Suspension of privileges;

(10) Termination of privileges;

(11) Denial of increase in privileges.

c. Time and Place for Hearing

Upon receipt of a request for hearing, the Chief Executive Officer shall deliver such request to the Chief of Staff or designee. The Chief Executive Officer or his designee shall, within ten (10) days after receipt of such request, schedule and arrange for a hearing. The Chief Executive Officer or his designee shall give notice to the affected practitioner of the time, place, and date of the hearing.

The date of the hearing shall be within forty-five (45) days from the date of receipt of the request for a hearing by the Chief Executive Officer. When the request is received from a member who is under suspension, which is then in effect, the hearing shall be held as soon as the arrangements may reasonably be made, but not to exceed fifteen (15) days from the date of receipt of the request for a hearing.

d. Notice of Charges

The notice of hearing shall state in concise language the acts of omissions with which the practitioner is charged, a list of any charts under question by chart number or where the issue involves any of the actions set out in Section 1,b. of Article VIII, the reasons for the denial of the request of the applicant or medical staff member.

e. Judicial Review Committee

When a hearing is requested, the Chief of Staff, with the approval of the Medical Executive Committee, shall appoint a judicial review committee which shall be composed of not less than five (5) members of the active medical staff to act pursuant to this Article. The members of the judicial review committee shall not have actively participated in the consideration of the matter involved at any previous level. Such appointment shall include designation of the chairman. Knowledge of the matter involved shall not preclude a member of the active medical staff from serving as a member of the judicial review committee. In the event that it is not possible to appoint a fully qualified judicial review committee from the active medical staff, the Medical Executive Committee may appoint qualified physicians from the associate staff or physicians outside the staff.

f. Postponements and Extensions

Postponements and extensions of time beyond the times expressly permitted in these bylaws may be requested by anyone but shall be permitted by the judicial review committee only on a showing of good cause.

g. Decision of the Hearing Committee

Within thirty (30) days after final adjournment of the hearing, except in the case of a medical staff member who shall be under suspension and then within fifteen (15) days, the judicial review committee shall render a decision which shall be delivered to the Medical Executive Committee and to the Governing Board, such decision to be accompanied by a written report, all other documentation, and the hearing record if prepared. The report shall contain a concise statement of the reasons for the decision, and a copy of the report and decision shall be delivered, by registered or certified mail, to the affected practitioner.

h. Appeal

The decision of the judicial review committee shall be considered final, subject to the right of appeal as provided in Section 3 (Appeal to Governing Board) of this Article.

Section 2. HEARING PROCEDURE

a. Personal Presence Mandatory

Under no circumstances shall the hearing be conducted without the personal presence of the person requesting the hearing unless he has waived such appearance or has failed without good cause to appear after appropriate notice. Such failure to appear shall be deemed to constitute a waiver of the right to such appearance. This does not waive the right to appeal to the Governing Board.

b. Representation

The affected practitioner shall be entitled to be accompanied by and/or represented at the hearing by a member of the medical staff in good standing, except if the member of the medical staff is also an attorney. Since the hearings provided for in these bylaws are for the purpose of intra-professional competency or conduct, neither the person requesting the hearing, the Medical Executive Committee, nor the Governing Board shall be represented in any phase of the hearing or appeals procedure by an attorney at law unless the hearing committee, in its discretion, permits both sides to be represented by legal counsel. The body whose decision prompted the hearing shall appoint a representative from the medical staff to present its recommendations in support thereof and to examine witnesses.

c. The Presiding Officer

The presiding officer at the hearing shall be the chairman or the hearing officer if one is appointed. The presiding officer shall act to insure that all participants in the hearing have a reasonable opportunity to be heard, and to present all oral and documentary evidence, and that decorum is maintained. He shall determine the order or procedure during the hearing and shall have the authority and discretion in accordance with these bylaws to make all rulings on questions which pertain to matters of law and to the admissibility of evidence.

d. The Hearing Officer

At the request of the person who requested the hearing, the Executive Committee, the Judicial Review Committee, or on its own initiative, the Governing Board may appoint a hearing officer who may be an attorney at law to preside at the hearing. Such hearing officer may be legal counsel

to the hospital provided he acts during the hearing in accord with this Article. He must not act as a prosecuting officer, as an advocate for the hospital, Governing Board, or Medical Executive Committee, or body whose action prompted the hearing. If requested by the Judicial Review Committee, he may participate in the deliberation of such body and be a legal advisor to it, but he shall not be entitled to vote.

e. Record of Hearing

The Judicial Review Committee must maintain a record of the hearing by one of the following methods: a shorthand reporter present to make a record of the hearing or a recording. The cost of such shorthand reporter's appearance shall be borne by the hospital and the party requesting the hearing, provided the cost of transcribing the record of the hearing shall be borne by the party requesting the transcription. The hearing committee may, but shall not be required to, order that oral evidence shall be taken only on oath or affirmation administered by any person designated by such body and entitled to notarize documents in the State of California.

f. Rights of the Parties

At a hearing, both the affected practitioner and the body whose action prompted the hearing shall have the following rights: to call and examine witnesses, to introduce exhibits, to cross-examine any witness on any matter relevant to the issues, to impeach any witness and to rebut any evidence. If the affected practitioner does not testify in his own behalf, he may be called and examined as if under cross-examination. The presiding officer in the exercise of his discretion may limit testimony that is cumulative.

g. Admissibility of Evidence

The hearing shall not be conducted according to rules of law relating to the examination of witnesses or presentation of evidence. Any relevant evidence shall be admitted by the presiding officer if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the admissibility of such evidence, in a court of law. Each party shall have the right to submit written argument, and the judicial review committee may request such a writing to be filed following the close of the hearing. The judicial review committee may interrogate the witnesses or call additional witnesses if it deems it appropriate.

h. Official Notice

The presiding officer shall have the discretion to take official notice of any matters either technical or scientific, relating to the issues under consideration which could have been judicially noticed by the courts of this State. Participants in the hearing shall be informed of the matters to be officially noticed or to refute the noticed matters by evidence or by written or oral presentation of authority. Reasonable or additional time shall be granted, if requested, to present written rebuttal of any evidence admitted on official notice.

i. Basis of Decision

The decision of the hearing committee shall be based on the evidence produced at the hearing. This evidence may consist of the following:

1) Oral testimony of witnesses;

2) Briefs or written arguments presented in connection with the hearing;

3) Any material contained in the medical staff's personnel files regarding the person who requested the hearing;

4) Any and all applications, references and accompanying documents;

5) All officially noticed matters;

6) Any other evidence deemed admissible under Section 2,g. of this Article.

j. Burden of Proof

In all cases specified in Section 1,b. of this Article, it shall be incumbent on the person who requested the hearing to initially come forward with evidence in his support. Thereafter, the burden shall shift to the body or committee whose decision prompted the hearing to come forward with evidence in support of its action or decision.

In all cases in which a hearing is conducted under this Article, after all the evidence has been submitted by both sides, the Judicial Review Committee shall rule against the person who requested the hearing unless it finds that he or she has proved by a preponderance of the evidence, that the decision that prompted the hearing was arbitrary or unreasonable, and should not be sustained by the evidence.

k. Adjournment and Conclusion

The presiding officer may adjourn the hearing and reconvene the same at the convenience of the participants without special notice. Upon conclusion of the presentation of oral and written evidence, the hearing shall be closed. The Judicial Review Committee shall thereupon, within the time limit specified in Section 1,g. of this Article, outside of the presence of any other person, conduct its deliberations and render a decision and accompanying report as provided by Section 1 of this Article.

Section 3. APPEAL TO GOVERNING BOARD

a. Time for Appeal

Within ten (10) days after receipt of the decision of the Judicial Review Committee, either the person who requested the hearing or the body whose decision prompted the hearing may request an appellate review by the Governing Board. The request shall be delivered to the Governing Board in writing and delivered either in person or by certified or registered mail. If such appellate review is not requested within such period, both sides shall be deemed to have accepted the action involved and it shall thereupon become final and shall be effective immediately. The written request for appeal shall also include a brief statement as to the reasons for appeal.

b. Grounds for Appeal

The grounds for appeal from the hearing shall be: 1) substantial failure of the hearing committee, Medical Executive Committee, or Governing Board to comply with the procedures required by this Article or by the hospital medical staff bylaws in the conduct of hearing and decisions upon hearing so as to deny a fair hearing; 2) action taken arbitarily or capriciously.

c. Time, Place, and Notice

In the event of any appeal to the Governing Board as set forth in the preceding subsection, the Governing Board shall, within ten (10) days after receipt to such notice of appeal, schedule a date for such review. The Governing Board through the Executive Director, shall notify the affected practitioner by certified or registered mail of the time, place, and date of the appellate review.

The date of appellate review shall not be less than fifteen (15) days, nor more than forty-five (45) days from the date of receipt of the request for appellate review, provided, however, that when a request for appellate review is from a member who is under suspension which is then in effect, the appellate review shall be held as soon as the arrangements may reasonably be made and not to exceed fifteen (15) days from the date of receipt of the request for appellate review unless additional time is required to complete the record. The time for appellate review may be extended by the chairman of the Governing Board for a good cause.

d. Hearing Officer

The Governing Board may appoint a hearing officer to preside over its hearing who may be the same or a different hearing officer as the one who presided over the hearing of the Judicial Review Committee. The same rules set forth above with respect to the hearing officer for the Judicial Review Committee shall apply to the hearing officer for the hearing before the Governing Board.

e. Nature of Appellate Review

The proceedings by the governing Board shall be in the nature of an appellate hearing based upon the record of the hearing before the Judicial Review Committee, provided that the Governing Board may, in its sole discretion, accept additional oral or written evidence subject to the same rights of crossexamination or confrontation provided at the original hearing. Each party shall have the right to present, within ten (10) days prior to the date of the review, a written statement in support of his position on appeal, and in its sole discretion, the Governing Board may allow each party or representative to personally appear and make oral argument. At the conclu-

sion of oral argument, if allowed, the Governing Board may thereupon at a time convenient to itself conduct deliberations outside the presence of the appellant and respondent and their representatives. The Governing Board may affirm, modify, or reverse the decision of the Judicial Review Committee.

f. Final Decision

Within ten (10) days after the conclusion of the appellate review, the Governing Board shall render a final decision in writing and shall deliver copies thereof to the affected practitioner and to the Medical Executive Committee in person or by certified or registered mail. The final decision of the Governing Board following the appeal shall be effective immediately and shall not be subject to further review.

g. Right to One Hearing Only

Except as otherwise provided in this Article, an affected practitioner shall be entitled as a matter of right to only one hearing before the Judicial Review Committee and one hearing before the Governing Board on any single matter which may be the subject of an appeal without regard to whether such subject is the result of action by the Medical Executive Committee or the Governing Board, or a combination of acts of such bodies.

ARTICLE IX

SPECIFIED PROFESSIONAL PERSONNEL

Section 1. APPOINTMENT AND ASSIGNMENT

Specified professional personnel, sometimes referred to as "allied health professionals", may be authorized by the medical staff to perform their professional services within

the hospital. They shall be individually authorized and assigned to an appropriate clinical department and shall carry out their professional activities under the supervision of the chairman of the department, or the appropriate attending staff member assigned responsibility, and subject to departmental policies and procedures.

Section 2. QUALIFICATIONS

a. The general qualifications to be required of members of each category of specified professional personnel shall be determined by the appropriate department concerned. The chairman of the department concerned shall submit a listing of such qualifications to the Medical Executive Committee for approval.

b. Specified professional personnel shall not be eligible for appointment of membership on the Medical Staff. Nothing herein shall create any vested rights in any Specified Professional Personnel to receive or to maintain any privileges in the Hospital. The provisions of Article VII and Article III of these bylaws shall not apply to specified professional personnel.

c. Each individual in this category shall have an appropriate application on file, and their department shall review and approve such. The application shall include evidence of licensure, training, and documentation of malpractice insurance.

[LAWRENCE SILVER A LAW CORPORATION
LETTERHEAD DELETED]

April 30, 1987

DELIVERED BY TELECOPIER,
HAND DELIVERED, AND
MAILED VIA CERTIFIED MAIL —
RETURN RECEIPT REQUESTED

Arthur N. Lurvey, M.D.
Chief of Staff
Midway Hospital Medical Center
5925 San Vicente Boulevard
Los Angeles, CA 90019

Re: Medical Staff Privileges

Dear Dr. Lurvey:

Please be advised that I represent Simon J. Pinhas, M.D. and I am authorized on his behalf to demand a hearing upon his summary suspension of medical staff privileges from Midway Hospital Medical Center ("Midway Hospital") and the Medical Staff of Midway Hospital Medical Center ("Medical Staff"). Dr. Pinhas demands that the hearing and the notice of charges be in conformity with the rights afforded to Dr. Pinhas by the Constitutions of the State of California and of the United States, the laws of the State of California, the contractual obligations imposed upon Midway Hospital and the Medical Staff, and to the extent that they are not inconsistent therewith, the Bylaws of the Medical Staff.

1. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests full disclosure of all charges against him with sufficient particularity that he may investigate and rebut those charges.

EXHIBIT "E"

2. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas demands that all proceedings be reported by a certified shorthand reporter.

3. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests access to the originals and a photocopy of all charts in their full, complete, and unaltered state, which have been used *or considered* in connection with bringing charges against Dr. Pinhas.

4. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a hearing officer who is a retired judge of the Superior Court, or, in the alternative, someone whose impartiality cannot be questioned. Further, Dr. Pinhas requests that the identity of the hearing officer be made known as soon as possible so that pre-hearing motions may be submitted to him and determine in advance of the hearing, including, but not limited to, motions to compel compliance with the demands herein made.

5. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the minutes of any meeting of any members of the staff of Midway Hospital or its Medical Staff in connection with considering to bring and the bringing of any charges against him.

6. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests all writings, as that term is defined by Section 250 of the California Evidence Code, and all copies which in any way are different therefrom, regarding any communication regarding his medical staff privileges or his performance as a physician at Midway Hospital.

7. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests all writings which are exculpatory to any charges or any sanction which might be sought to be imposed.

8. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a list of all witnesses to any of the events

involving the charges whether or not they are intended to be called at the time of the hearing.

9. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a list of all witnesses who the Hospital intends to call at the time of the hearing.

10. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a written summary of the direct testimony of all witnesses who will be called in the proceedings against him.

11. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the opportunity to interview all witnesses who may be called as witnesses against him.

12. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the assurance that the Hospital shall require its employees who he designates and the Medical Staff shall require that all of its members, as required by the Bylaws, be available to testify, if so requested by Dr. Pinhas, at the hearing in this matter.

13. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that all reports of expert witnesses to be called by the Hospital be submitted to him no less than 10 days prior to their being called as witnesses and that the Hospital be precluded from calling any expert witness if such report is not made available.

14. Pursuant to all of Dr. Finhas's rights, Dr. Pinhas requests a hearing panel composed of physicians not members of the staff of Midway Hospital and that all members of the hearing panel be free of bias, prejudice, prejudgment and not possessed of any information regarding any of the charges in advance of the hearing.

15. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the identity of the members of the hearing panel

be disclosed to him as soon as possible so that he may determine whether or not to file motions for disqualifications in advance of the hearing date.

16. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that the hearing panel be instructed immediately upon selection that they are not to discuss this matter with any person, including, but not limited to, the person or persons who will represent the Hospital or the Medical Staff or any witnesses that the Hospital may call. In the event that such discussion is had with them, they are required to report it immediately to Dr. Pinhas or his counsel and possibly volunteer their disqualification from the case.

17. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that all witnesses who are intended to be called at the hearing be instructed not to discuss the matter with any members of the hearing panel.

18. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the right to be represented by a physician who is also an attorney at the hearing. He requests that this physician who is also an attorney present and argue motions on his behalf, examine and cross-examine witnesses, may introduce evidence, and fully and completely participate in the hearing and protect the record.

19. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that he be represented by an attorney at the hearing. He request that this attorney present and argue motions on his behalf, examine and cross-examine witnesses, may introduce evidence, and fully and completely participate in the hearing and protect the record.

20. Pursuant to all of his rights, in the event that either or both of the above requests are denied, he request that his attorney appear in the hearings to make all legal

arguments to protect his record, introduce evidence, and to cross-examine witnesses, or in some fashion be permitted to participate in the hearing.

21. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that in the event that the above three requests are denied, he requests the opportunity to have his attorney sit in the hearing and advise him during the course of proceedings without actual participation in the hearing.

22. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas demands production of all communications with the Department of Health Services or any governmental agency regarding his practice of medicine.

23. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas demands production of all contracts between Midway Hospital or Summit, or any affiliates, parents or subsidiaries, with any member of the Medical Staff for purposes of determining bias, interest or for purposes of impeachment or any other appropriate evidentiary purpose.

24. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas demands the identification of all persons selected as a hearing officer and all persons selected by the Hospital sit on the panel so that he may have time to investigate their impartiality, determine whether to conduct appropriate voir dire examination, or to seek, other relief in connection with their appointment.

Pursuant to my agreement with Mr. Kadzielski of Weissburg & Aronson, this demand signed by me is timely and effective if served upon you (or a person in charge) at the Administrator's office at the Hospital or delivered to you (or a person in charge) at your office, or telecopied to Mark Kadzielski at his office before midnight, April 30, 1987.

Sincerely,

Lawrence Silver

cc: Arthur N. Lurvey, M.D. (Hand Delivered)
435 N. Roxbury, Suite 100
Beverly Hills, CA 90210

Simon J. Pinhas, M.D.
Mark Kadzielski, Esq.

[MIDWAY HOSPITAL MEDICAL CENTER
LETTERHEAD DELETED]

May 7, 1987

Simon Pinhas, MD
9033 Wilshire Blvd. #206
Beverly Hills, CA 90211

BY: CERTIFIED MAIL
HAND
DELIVERED:
(5/7/87)

Dear Doctor Pinhas:

This letter is in response to your request for a hearing at Midway Hospital Medical Center related to your summary suspension and the recommendation to terminate your medical staff membership. Pursuant to Article VIII, Section I.c., this hearing will be held at 6:30 p.m. on May 12, 1987 in the Pavilion Conference Room.

A Judicial Review Committee has been appointed by the Chief of Staff. Its Chairman is Ellis Berkowitz, MD, and its members are: John Hofbauer, MD; Jay Jordan, MD: Debra Judelson, MD; Alan Kessler, MD; Dwight Makoff, MD and Stephen Seiff, MD. These committee members have been advised not to discuss this matter with you or any other member of the Hospital's Medical Staff.

The decisions to summarily suspend and to terminate your membership at Midway Hospital Medical Center were based on reviews of your patient records involving ophthalmological surgeries conducted at this Hospital in

EXHIBIT "F"

1987. These reviews concluded that your conduct of patient care was below the acceptable standard of care in this Hospital.

The specific charges that support this conclusion, and the specific charts that support these charges are as follows:

1. JUDGMENT TO PROCEED WITH SURGERY NOT WITHIN STANDARD OF CARE IN HOSPITAL.

A. No History and Physical on patient chart prior to surgery:

Chart #7071027
Chart #7070713
Chart #7070489
Chart #7070403
Chart #7070179
Chart #7067615
Chart #7066244
Chart #7063199
Chart #7059728
Chart #7059574
Chart #7029896/2885069

B. Incomplete Pre-Operative workup:

Chart #7087136
Chart #7084633
Chart #7084609
Chart #7084595
Chart #7083955
Chart #7082142
Chart #7081316
Chart #7079249
Chart #7078307
Chart #7078293
Chart #7078285
Chart #7078145
Chart #7078072
Chart #7075979
Chart #7075936
Chart #7075928
Chart #7075375
Chart #7075332
Chart #7073054
Chart #7072376
Chart #7070543
Chart #7070004
Chart #7069979
Chart #7068204
Chart #7067836
Chart #7066244
Chart #7065167
Chart #7065094
Chart #7063059
Chart #7062664
Chart #7059639
Chart #7059612
Chart #7057172
Chart #7051832

C. Surgery contraindicated by patients' medical condition:

Chart #7087365
Chart #7087136
Chart #7084663
Chart #7084609
Chart #7083998
Chart #7082142
Chart #7081316
Chart #7079249
Chart #7078102
Chart #7075936
Chart #7075529
Chart #7072392
Chart #7072376
Chart #7070446
Chart #7068204
Chart #7065183/2909006
Chart #7065094
Chart #7065035
Chart #7062664
Chart #7062664
Chart #7059639
Chart #7059612
Chart #7056915
Chart #7054459
Chart #7029896/2885069

2. FAILURE TO OBTAIN REQUIRED CONSENT FOR PROCEDURE PERFORMED.

A. Lack of appropriate consent for procedure performed:

Chart #7068204
Chart #7067674
Chart #7066244
Chart #7065086/2908727
Chart #7063318

B. Lack of informed consent for surgery:

Chart #7085788
Chart #7084099
Chart #7081936
Chart #7081928
Chart #7079397
Chart #7079389
Chart #7078293
Chart #7078129
Chart #7075456
Chart #7072422
Chart #7068182
Chart #7068107
Chart #7065019
Chart #7062699
Chart #7057172

C. No IntraOcular Lens Consent:

Chart #7084692	Chart #7065086/
Chart #7084684	2908727
Chart #7083947	Chart #7063318
Chart #7082142	Chart #7062699
Chart #7079273	Chart #7062672
Chart #7072724	Chart #7062605
Chart #7070713	Chart #7062532
Chart #7070535	Chart #7059639
Chart #7067585	Chart #7057687
Chart #7066244	Chart #7057563
Chart #7065153	Chart #7057172
Chart #7065132	Chart #7029896/
	2885069

3. NO ASSISTANT AT SURGERY AS REQUIRED BY MEDICAL STAFF BYLAWS:

Chart #7057644	Chart #7057563
Chart #7057636	Chart #7057555
Chart #7057628	Chart #7057547

The Judicial Review Committee has been polled with regard to your requests for representation by counsel, pursuant to Article VIII., Section 2.b. You are hereby advised that the Committee has unanimously voted not to permit either you or the Medical Staff to be represented by an attorney at law at the hearing. You are entitled, as that section indicates, to be represented by a member of the Medical Staff in good standing. If you will be represented by a staff member, please inform the undersigned of the identity of that person so that further communication regarding this matter can also be directed to that person.

A Hearing Officer, Richard Posell, Esq., has been appointed by the Governing Board. Mr. Posell is a partner in the law firm of Shapiro, Posell & Close and is experienced at conducting hearings of this type at hospitals. A certified shorthand reporter has also been ordered to maintain a record of the hearing.

If you wish to review the charts in question prior to the hearing, please contact Peggy Farber RN, Director of Quality Assurance at 932-5231 or 932-5022 to make these arrangements. If copies of these records are requested, arrangements can be made with Ms. Farber after you have completed the appropriate Non-Disclosure Agreement. Copies will be handled at your own expense.

The hearing will be conducted pursuant to the provisions of Article VIII of the Midway Hospital Medical Center Medical Staff Bylaws. Those Bylaws do not provide for pre-hearing discovery of any documents or information related to the proceedings. Additionally, the Hospital does not have subpoena power or other powers to compel any one to testify at a medical staff hearing.

While the Medical Staff is not required under the Bylaws to provide you with a list of witnesses it intends to call at the hearing, the following is a list of those persons who are currently expected to testify on behalf of the Medical Staff at the hearing: Alan Friedman, MD; Arthur Lurvey, MD; Jonathan Macy, MD; James Salz, MD and Maurice Schmir, MD. the Medical Staff reserves the right to add to this list, or delete from it at any time.

Please provide the undersigned with a list of your witnesses as soon as possible.

Very truly yours,

Mitchell Feldman
Regional Vice-President

cc: Lawrence Silver, Esq.

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

In The Matter Of
SIMON J. PINHAS, M.D.
Respondent.

LAWRENCE SILVER
A LAW CORPORATION
9100 Wilshire Boulevard, Suite 360
Beverly Hills, California 90212
(213) 274-1530

LAWRENCE SILVER
Attorney for Plaintiff
Simon D. Pinhas, M.D.

RESPONDENT'S OBJECTIONS TO THE NOTICE OF HEARING

Date: May 12, 1987, Time: 630 a.m.
Place: Pavillion Conference Room

COMES NOW Simon J. Pinhas, M.D., Respondent, appearing specially and without waiving any rights to challenge the jurisdiction of this committee and other deficiencies in the notice, and hereby notifies the Judicial Review Committee of his objections to the hearing date as noticed herein. Respondent and his counsel in support thereof allege the following facts to be true:

1. By letter dated April 13, 1987, Dr. Pinhas was advised by Midway Hospital Medical Center ("Midway") that he was summarily suspended as of that date of all medical staff, including admitting and surgical, privileges. The letter stated that such action was the result of a: "medical staff review of Dr. Pinhas's medical records,

EXHIBIT "G"

with consideration as to the questions raised regarding: indication for surgery; appropriateness of surgical procedures in light of patient's medical condition; adequacy of documentation in medical records; and ongoing pattern of identified problems." (A copy of the April 13 letter is attached hereto as Exhibit "1".)

2. By the same letter, Dr. Pinhas was advised that the Midway Medical Executive Committee would convene to review and consider the action within 10 days.

3. On April 20, Dr. Pinhas, while present at Midway in connection with other matters, was beckoned to attend — immediately — a meeting. He did so, and this meeting turned out to be the Midway Medical Executive Committee ("Executive Committee") meeting.

4. The Executive Committee requested that Dr. Pinhas make a statement. Lacking notice, unprepared, confused and without benefit of legal or fellow staff advice, he did so briefly.

5. By letter dated April 20, 1987, Midway notified Dr. Pinhas that the Medical Executive Committee had upheld the summary suspension with a recommendation to terminate his staff privileges at Midway. He was also informed that the Midway Board of Directors had concurred with the Executive Committee's recommendation. (A copy of the April 20 letter is attached hereto as Exhibit "2".)

6. In accordance with the Midway Medical Staff Bylaws, Dr. Pinhas requested a hearing by the Judicial Review Committee by letter dated April 30, 1987. (A copy of the April 30 letter is attached hereto as Exhibit "3".)

7. On May 7, 1987, counsel for respondent telephoned counsel for Midway to determine the status of the notice of hearing herein. Counsel for respondent was advised

that a letter representing such notice would be hand-delivered that day.

8. On the same day, May 7, counsel for respondent telephoned once again, after 5:00 p.m., to ascertain the whereabouts of the notice of hearing. After 5:30 p.m., the notice of hearing was delivered. (A copy of the May 7 letter is attached hereto as Exhibit "4".)

9. The notice of hearing scheduled this matter to be heard at 6:30 p.m. on May 12, 1987.

10. Respondent was thereby informed of the charges, albeit inadequately, and allowed as notice only two business days — with an intervening weekend — to prepare a defense in this matter.

11. Under these circumstances, proceeding with the hearing as scheduled would not only work a hardship to respondent, be detrimental to reasonable preparation, but would also constitute an obvious deprivation of fair procedure and due process.

12. The notice of hearing itself is deficient, lacking as it does specificity and detail. Although the notice sets forth what it labels "specific charges" and lists "specific charts" it contends will support those charges, the charges are rendered in broad, general terms.

13. The identified charts as of the date of this Objection, have *not* been made available, and are *not* available, to respondent or his counsel. Approximately 128 charts are identified, though some appear to be duplicates.

14. Furthermore, the "notice" does not provide the name of the prosecuting medical staff representative, and summarily — and in a self-serving prophylactic fashion — dismisses anticipated respondent requests that more

properly should be heard on motion before the Judicial Review Committee.

15. Moreover, the Midway Medical Staff Bylaws contemplate that the Chief Executive Officer or a designee member of the Medical Staff shall execute the notice of the hearing. In this additional regard, the notice of hearing lacks authentication and is defective.

16. Simply stated, the "notice" does not provide a reasonable quantum of time in which respondent can prepare, present and have decided the preliminary motions that must be resolved — with respect to procedure and substance herein — prior to the hearing in this matter.

17. Without more specific information, without possession and sufficient review and analysis of documentary evidence, the hearing as established and scheduled, contravenes respondent's rights, under the United States and California Constitutions, the laws of the State of California, and the contractual obligations imposed upon Midway Hospital and the Medical Staff, to fair notice and a rational and meaningful opportunity to be heard.

WHEREFORE, respondent requests that the Judicial Review Committee sustain his objections and dismiss the notice of hearing as totally defective.

DATED: May 8, 1987

LAWRENCE SILVER
A LAW CORPORATION

By: _____(signature)_____
Lawrence Silver, Attorneys for
Simon J. Pinhas, M.D.

[MIDWAY HOSPITAL MEDICAL CENTER
LETTERHEAD DELETED]

April 13, 1987

Simon Pinhas, MD
9033 Wilshire Blvd. # 206
Beverly Hills, CA 90211

CERTIFIED MAIL
RETURN RECEIPT
REQUESTED

Dear Doctor Pinhas:

In accordance with the Bylaws of the Medical Staff of Midway Hospital Medical Center, Article VII, Section 2, you are hereby advised of the Summary Suspension of all your medical staff privileges; including admitting and surgical.

This suspension shall become effective on April 13th, 1987, at 3:00 p.m. The Medical Executive Committee of Midway Hospital Medical Center shall convene to review and consider this action within 10 days as specified in the Bylaws.

This is a result of Medical Staff review of your medical records, with consideration as to the questions raised regarding: indications for surgery; appropriateness of surgical procedures in light of patient's medical condition; adequacy of documentation in medical records; and ongoing pattern of identified problems.

A copy of Article VII and Article VIII are enclosed for your information.

Sincerely,

Arthur N. Lurvey, MD
Chief of Staff

Mitchell Feldman
Regional Vice-President

EXHIBIT "1"

[MIDWAY HOSPITAL MEDICAL CENTER
LETTERHEAD DELETED]

April 20, 1987

Simon Pinhas, MD
9033 Wilshire Blvd. # 206
Beverly Hills, CA 90211

HAND DELIVERED AND BY
CERTIFIED MAIL
RETURN RECEIPT
REQUESTED

Dear Doctor Pinhas:

Thank you for your statements at the Medical Executive Committee meeting held on April 17, 1987.

Please be advised that the Medical Executive Committee has reviewed and considered the action taken and upheld the summary suspension with a recommendation to terminate your medical staff privileges at Midway Hospital Medical Center. The Board of Directors of Midway Hospital Medical Center has concurred with their recommendation.

Pursuant to the Medical Staff Bylaws, Article VIII, you are entitled to a hearing as outlined in Section 1.a . . You have ten days from the date of receipt of this letter to request a hearing by a Judicial Review Committee. Said request shall be by written notice send [sic] by certified mail to the Chief Executive Director of the Hospital. If you fail to request a hearing within the specified time frames the recommended action shall become effective immediately.

Enclosed is a copy of Article VIII. Please be advised, per the letter dated April 13, 1987, that summary suspension of all privileges includes admitting and surgical privileges.

Sincerely,

Arthur N. Lurvey, M.D.
Chief of Staff

EXHIBIT "2"

[LAWRENCE SILVER A LAW CORPORATION
LETTERHEAD DELETED]

April 30, 1987

DELIVERED BY TELECOPIER,
HAND DELIVERED, AND
MAILED VIA CERTIFIED MAIL —
RETURN RECEIPT REQUESTED

Arthur N. Lurvey, M.D.
Chief of Staff
Midway Hospital Medical Center
5925 San Vicente Boulevard
Los Angeles, CA 90019

Re: Medical Staff Privileges

Dear Dr. Lurvey:

Please be advised that I represent Simon J. Pinhas, M.D. and I am authorized on his behalf to demand a hearing upon his summary suspension of medical staff privileges from Midway Hospital Medical Center ("Midway Hospital") and the Medical Staff of Midway Hospital Medical Center ("Medical Staff"). Dr. Pinhas demands that the hearing and the notice of charges be in conformity with the rights afforded to Dr. Pinhas by the Constitutions of the State of California and of the United States, the laws of the State of California, the contractual obligations imposed upon Midway Hospital and the Medical Staff, and to the extent that they are not inconsistent therewith, the Bylaws of the Medical Staff.

1. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests full disclosure of all charges against him with sufficient particularity that he may investigate and rebut those charges.

EXHIBIT "3"

2. Pursuant to all of Dr. Pinhas's right, Dr. Pinhas demands that all proceedings be reported by a certified shorthand reporter.

3. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests access to the originals and a photocopy of all charts in their full, complete, and unaltered state, which have been used *or considered* in connection with bringing charges against Dr. Pinhas.

4. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a hearing officer who is a retired judge of the Superior Court, or, in the alternative, someone whose impartiality cannot be questioned. Further, Dr. Pinhas requests that the identity of the hearing officer be made known as soon as possible so that pre-hearing motions may be submitted to him and determine [sic] in advance of the hearing, including, but not limited to, motions to compel compliance with the demands herein made.

5. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the minutes of any meeting of any members of the staff of Midway Hospital or its Medical Staff in connection with considering to bring and the bringing of any charges against him.

6. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests all writings, as that term is defined by Section 250 of the California Evidence Code, and all copies which in any way are different therefrom, regarding any communication regarding his medical staff privileges or his performance as a physician at Midway Hospital.

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8. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a list of all witnesses to any of the events

involving the charges whether or not they are intended to be called at the time of the hearing.

9. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a list of all witnesses who the Hospital intends to call at the time of the hearing.

10. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a written summary of the direct testimony of all witnesses who will be called in the proceedings against him.

11. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the opportunity to interview all witnesses who may be called as witnesses against him.

12. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the assurance that the Hospital shall require its employees who he designates and the Medical Staff shall require that all of its members, as required by the Bylaws, be available to testify, if so requested by Dr. Pinhas, at the hearing in this matter.

13. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that all reports of expert witnesses to be called by the Hospital be submitted to him no less than 10 days prior to their being called as witnesses and that the Hospital be precluded from calling any expert witness if such report is not made available.

14. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a hearing panel composed of physicians not members of the staff of Midway Hospital and that all members of the hearing panel be free of bias, prejudice, prejudgment and not possessed of any information regarding any of the charges in advance of the hearing.

15. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the identity of the members of the hearing panel

be disclosed to him as soon as possible so that he may determine whether or not to file motions for disqualifications in advance of the hearing date.

16. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that the hearing panel be instructed immediately upon selection that they are not to discuss this matter with any person, including, but not limited to, the person or persons who will represent the Hospital or the Medical Staff or any witnesses that the Hospital may call. In the event that such discussion is had with them, they are required to report it immediately to Dr. Pinhas or his counsel and possibly volunteer their disqualification from the case.

17. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that all witnesses who are intended to be called at the hearing be instructed not to discuss the matter with any members of the hearing panel.

18. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the right to be represented by a physician who is also an attorney at the hearing. He requests that this physician who is also an attorney present and argue motions on his behalf, examine and cross-examine witnesses, may introduce evidence, and fully and completely participate in the hearing and protect the record.

19. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that he be represented by an attorney at the hearing. He request [sic] that this attorney present and argue motions on his behalf, examine and cross-examine witnesses, may introduce evidence, and fully and completely participate in the hearing and protect the record.

20. Pursuant to all of his rights, in the event that either or both of the above requests are denied, he requests that his attorney appear in the hearings to make all

legal arguments to protect his record, introduce evidence, and to cross-examine witnesses, or in some fashion be permitted to participate in the hearing.

21. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that in the event that the above three requests are denied, he requests the opportunity to have his attorney sit in the hearing and advise him during the course of proceedings without actual participation in the hearing.

22. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas demands production of all communications with the Department of Health Services or any governmental agency regarding his practice of medicine.

23. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas demands production of all contracts between Midway Hospital or Summit, or any affiliates, parents or subsidiaries, with any member of the Medical Staff for purposes of determining bias, interest or for purposes of impeachment or any other appropriate evidentiary purpose.

24. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas demands the identification of all persons selected as a hearing officer and all persons selected by the Hospital sit on the panel so that he may have time to investigate their impartiality, determine whether to conduct appropriate voir dire examination, or to seek other relief in connection with their appointment.

Pursuant to my agreement with Mr. Kadzielski of Weissburg & Aronson, this demand signed by me is timely and effective if served upon you (or a person in charge) at the Administrator's office at the Hospital or delivered to you (or a person in charge) at your office, or telecopied to Mark Kadzielski at his office before midnight, April 30, 1987.

Sincerely,

Lawrence Silver

cc: Arthur N. Lurvey, M.D. (Hand Delivered)
435 N. Roxbury, Suite 100
Beverly Hills, CA 90210
Simon J. Pinhas, M.D.
Mark Kadzielski, Esq.

[MIDWAY HOSPITAL MEDICAL CENTER LETTERHEAD DELETED]

May 7, 1987

Simon Pinhas, MD
9033 Wilshire Blvd. #206
Beverly Hills, Ca 90211

BY: CERTIFIED MAIL
HAND DELIVERED:
(5/7/87)

Dear Doctor Pinhas:

This letter is in response to your request for a hearing at Midway Hospital Medical Center related to your summary suspension and the recommendation to terminate your medical staff membership. Pursuant to Article VIII, Section I.c., this hearing will be held at 6:30 p.m. on May 12, 1987 in the Pavilion Conference Room.

A Judicial Review Committee has been appointed by the Chief of Staff. Its Chairman is Ellis Berkowitz, MD, and its members are: John Hofbauer, MD; Jay Jordan, MD; Debra Judelson, MD; Alan Kessler, MD; Dwight Makoff, MD and Stephen Seiff, MD. These committee members have been advised not to discuss this matter with you or any other member of the Hospital's Medical Staff.

The decisions to summarily suspend and to terminate your membership at Midway Hospital Medical Center were based on reviews of your patient records involving ophthalmological surgeries conducted at this Hospital in 1987. These reviews concluded that your conduct of pa-

EXHIBIT "4"

tient care was below the acceptable standard of care in this Hospital.

The specific charges that support this conclusion, and the specific charts that support these charges are as follows:

1. JUDGMENT TO PROCEED WITH SURGERY NOT WITHIN STANDARD OF CARE IN HOSPITAL.

A. No History and Physical on patient chart prior to surgery:

Chart #7071027	Chart #7066244
Chart #7070713	Chart #7063199
Chart #7070489	Chart #7059728
Chart #7070403	Chart #7059574
Chart #7070179	Chart #7029896/
Chart #7067615	2885069

B. Incomplete Pre-Operative workup:

Chart #7087136	Chart #7075332
Chart #7084633	Chart #7073054
Chart #7084609	Chart #7072376
Chart #7084595	Chart #7070543
Chart #7083955	Chart #7070004
Chart #7082142	Chart #7069979
Chart #7081316	Chart #7068204
Chart #7079249	Chart #7067836
Chart #7078307	Chart #7066244
Chart #7078293	Chart #7065167
Chart #7078285	Chart #7065094
Chart #7078145	Chart #7063059
Chart #7078072	Chart #7062664
Chart #7075979	Chart #7059639
Chart #7075936	Chart #7059612
Chart #7075928	Chart #7057172
Chart #7075375	Chart #7051832

C. Surgery contraindicated by patients' medical condition:

Chart #7087365	Chart #7070446
Chart #7087136	Chart #7068204
Chart #7084663	Chart #7065183/
Chart #7084609	2909006
Chart #7083998	Chart #7065094
Chart #7082142	Chart #7065035
Chart #7081316	Chart #7062664
Chart #7079249	Chart #7062664
Chart #7078102	Chart #7059639
Chart #7075936	Chart #7059612
Chart #7075529	Chart #7056915
Chart #7072392	Chart #7054459
Chart #7072376	Chart #7029896/
	2885069

2. FAILURE TO OBTAIN REQUIRED CONSENT FOR PROCEDURE PERFORMED.

A. Lack of appropriate consent for procedure performed:

Chart #7068204	Chart #7065086/
Chart #7067674	2908727
Chart #7066244	Chart #7063318

B. Lack of informed consent for surgery:

Chart #7085788	Chart #7078129
Chart #7084099	Chart #7075456
Chart #7081936	Chart #7072422
Chart #7081928	Chart #7068182
Chart #7079397	Chart #7068107
Chart #7079389	Chart #7065019
Chart #7078293	Chart #7062599
	Chart #7057172

C. No IntraOcular Lens Consent:

Chart #7084692	Chart #7065086/
Chart #7084684	2908727
Chart #7083947	Chart #7063318
Chart #7082142	Chart #7062699
Chart #7079273	Chart #7062672
Chart #7072724	Chart #7062605
Chart #7070713	Chart #7062532
Chart #7070535	Chart #7059639
Chart #7067585	Chart #7057687
Chart #7066244	Chart #7057563
Chart #7065153	Chart #7057172
Chart #7065132	Chart #7029896/
	2885069

3. NO ASSISTANT AT SURGERY AS REQUIRED BY MEDICAL STAFF BYLAWS:

Chart #7057644	Chart #7057563
Chart #7057636	Chart #7057555
Chart #7057628	Chart #7057547

The Judicial Review Committee has been polled with regard to your requests for representation by counsel, pursuant to Article VIII., Section 2.b. You are hereby advised that the Committee has unanimously voted not to permit either you or the Medical Staff to be represented by an attorney at law at the hearing. You are entitled, as that section indicates, to be represented by a member of the Medical Staff in good standing. If you will be represented by a staff member, please inform the undersigned of the identity of that person so that further comunication regarding this matter can also be directed to that person.

A Hearing Officer, Richard Posell, Esq., has been appointed by the Governing Board. Mr. Posell is a partner in the law firm of Shapiro, Posell & Close and is experienced at conducting hearings of this type of hospi-

tals. A certified shorthand reporter has also been ordered to maintain a record of the hearing.

If you wish to review the charts in question prior to the hearing, please contact Peggy Farber RN, Director of Quality Assurance at 932-5231 or 932-5022 to make these arrangmenets. If copies of these records are requested, arrangements can be made with Ms. Farber after you have completed the appropriate Non-Disclosure Agreement. Copies will be handled at your own expense.

The hearing will be conducted pursuant to the provisions of Article VIII of the Midway Hospital Medical Center Medical Staff Bylaws. Those Bylaws do not provide for pre-hearing discovery of any documents or information related to the proceedings. Additionally, the Hospital does not have subpoena power or other powers to compel any one to testify at a medical staff hearing.

While the Medical Staff is not required under the Bylaws to provide you with a list of witnesses it intends to call at the hearing, the following is a list of those persons who are currently expected to testify on behalf of the Medical Staff at the hearing: Alan Friedman, MD; Arthur Lurvey, MD; Jonathan Macy, MD; James Salz, MD and Maurice Schmir, MD. The Medical Staff reserves the right to add to this list, or delete from it at any time. Please provide the undersigned with a list of your witnesses as soon as possible.

Very truly yours,

Mitchell Feldman
Regional Vice-President

cc: Lawrence Silver, Esq.

(PROOF OF SERVICE OMITTED IN PRINTING)

[LAWRENCE SILVER A LAW CORPORATION
LETTERHEAD DELETED]

May 8, 1987

HAND DELIVERY
Richard Posell, Esq.
Shapiro, Posell & Close
2029 Century Park East
Suite 2600
Los Angeles, CA 90067

Re: Matter of Simon J. Pinhas, M.D.

Dear Mr. Posell:

We have been advised that you have been appointed by the Midway Hospital Governing Board to act as the Hearing officer in connection with the Judicial Review Committee hearing regarding the summary suspension and recommended termination of medical staff membership of Simon J. Pinhas, M.D.

In this respect, we request in order to determine whether to file a challege to your sitting as hearing officer:

1. A full and complete recitation of any and all discussions you have had, or knowledge or information you have, with respect to this matter;

2. A full and complete recitation of any and all relationships and/or involvement you have had, prior to this matter, with Midway Hospital and/or Summit Health, Ltd.;

3. A full and complete recitation of any and all other medical peer review hearings in which you have been involved;

EXHIBIT "H"

4. A full and complete recitation of any and all business or matters referred to you by Weissburg & Aronson;

5. A full and complete recitation of any and all business or matters referred by you to Weissburg & Aronson;

6. A statement as to whether or not you were appointed as Hearing Officer in this matter by, at the behest or request of Weissburg & Aronson; and

7. The amount of compensation you will receive in connection with your appointment and functions as Hearing Officer in this matter.

8. The indentification of any hospitals, or other health care providers that you or your firm represents.

9. Any reason why you might not be able to fully protect Dr. Phinas' rights or to be fair to him in the hearing of this case.

Please find enclosed a copy of Respondent's objections to Notice of Hearing dated May 7, 1987.

Sincerely,

Lawrence Silver

cc: Simon Pinhas, M.D.
with enclosure

LS:wbr

[SHAPIRO, POSELL & CLOSE
LETTERHEAD DELETED]

May 11, 1987

HAND DELIVERY

Lawrence Silver, Esq.
9100 Wilshire Boulevard
Suite 360
Beverly Hills, CA 90212

Re: Matter of Simon J. Pinhas, M.D.

Dear Mr. Silver:

I am in receipt of your letter of May 8, 1987, which was hand delivered to my office on the afternoon of May 8, 1987. As you know, my appointment as hearing officer in connection with the Judicial Review Committee hearing requested by Simon J. Pinhas, M.D. was made in accordance with the Bylaws of Midway Hospital. Those Bylaws provide, in Article VIII, Section 2d, that a hearing officer may be an attorney at law. There are no other requirements. I can assure you that I am an attorney at law licensed to practice in the state of California.

Furthermore, there is no reason why I cannot be fair to all of the parties in this matter, and I intend to be so. It would be inappropriate for me to respond further to your May 8, 1987 letter.

Very truly yours,

Shapiro, Posell & Close

Richard E. Posell

REP/hh

cc: Midway Hospital Medical Staff Office

EXHIBIT "I"

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

RESPONDENT'S MOTION FOR DETERMINATION AS TO THE BURDEN OF PROOF IN THE INSTANT PROCEEDING

COMES NOW Simon J. Pinhas, M.D., Respondent, by his attorneys of record, Lawrence Silver A Law Corporation, and hereby requests that the Judicial Review Committee enter an order determining the burden of proof at the hearing herein.

Respondent and his counsel in support thereof allege the following facts to be true:

1. Article VIII, Section 2j of the Midway Hospital Medical Center Medical Staff Bylaws provides:

> "In all cases specified in Section 1, b. of this Article, it shall be incumbent on the person requesting the hearing to initially come forward with evidence in his support. Thereafter the burden shall shift to the body or committee whose decision prompted the hearing to come forward with evidence in support of its actions or decision."

2. Respondent demanded the present hearing upon his summary suspension of medical staff privileges, including admitting and surgical privileges, from Midway Hospital Medical Center.

3. Until May 7, 1987, Dr. Pinhas was not officially notified of the nature of charges to be presented in this proceeding, and only then was he inadequately notified.

EXHIBIT "J"

4. The Midway Hospital Medical Center Medical Staff Bylaws impose the burden of proof on respondent to initially come forward with evidence in his support. Article VIII, Section 2j of those Bylaws states:

> "... After all the evidence has been submitted by both sides, the Judicial Review Committee shall rule against the person who requested the hearing unless it finds that he or she has proved by a preponderance of the evidence, that the decision that prompted the hearing was arbitrary or unreasonable, and should not be sustained by the evidence."

5. This provision creates an unfair burden on Respondent in that the Respondent is immediately obliged to prove the negative, *i.e.*, that he did not engage in the conduct alleged.

6. The burden of proof should be on the Hospital because it is making allegations that the Respondent's conduct in connection with patient care was below the acceptable standard of care in the Hospital.

7. None of the allegations made by the Hospital/Medical Staff can be established without the calling of witnesses and Respondent should not be put to the burden of having to call witnesses to disprove something until it is actually proven by the Hospital. Only after cross-examination and the presentation of his own evidence will Respondent be able to meet the charges.

8. The principles of fair procedure and due process guaranteed to Respondent under the California and United States Constitutions cannot be so misconstrued as to condone a proposition so novel as to be inimicable to the established American standard that a party is deemed innocent until proven guilty.

WHEREFORE, it is requested that the Judicial Review Committee enter an order that the burden of proof is on the Hospital/Medical Staff and that it be the standard of "clear and convincing" evidence.

DATED: May 14, 1987

LAWRENCE SILVER
A LAW CORPORATION

BY: (signature)
Lawrence Silver, Attorney
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

RESPONDENT'S REQUEST THAT IN THE EVENT THAT HE IS DENIED THE RIGHT TO REPRESENTATION BY A PHYSICIAN-ATTORNEY AT ALL STAGES OF THE PROCEEDINGS OR BY ATTORNEY LIMITED TO CERTAIN FUNCTIONS IN THE PROCEEDING THAT ALTERNATIVELY RESPONDENT BE GRANTED THE OPPORTUNITY TO HAVE HIS ATTORNEY SIT IN THE HEARING AND ADVISE HIM WITHOUT ACTUAL PARTICIPATION IN THAT HEARING

COMES NOW Simon J. Pinhas, M.D., Respondent, by his attorneys of record, Lawrence Silver A Law Corporation, and hereby requests that the Judicial Review Committee permit him to be represented by counsel at the hearing to the extent of permitting his attorney the opportunity to sit in the hearing and advise Respondent during the course of proceedings without actually participating in the hearing itself.

Respondent and his counsel in support thereof allege the following facts to be true:

1. By letter dated April 30, 1987, in accordance with the Midway Medical Staff Bylaws, Respondent requested a hearing by the Judicial Review Committee. In that same letter, Respondent requested the right to be represented by a physician who is also an attorney at that hearing.

2. By letter dated May 7, 1987, Respondent was served with a Notice of Hearing in this matter and was advised that his request for representation by counsel had been denied.

3. The right to retained counsel is a crucial part to due process and fair procedure as provided to Respondent by the Federal and California Constitutions and fair procedure.

4. Failure to allow Respondent to be represented by counsel will seriously prejudice his representation and presentation of his case and will be in violation of the California and Federal Constitutions and fair procedure.

WHEREFORE, it is requested that the Judicial Review Committee permit counsel for Dr. Pinhas to sit in on the hearing and advise Respondent during the course of the proceeding without actual participation in the hearing itself.

DATED: May 14, 1987

LAWRENCE SILVER
A LAW CORPORATION

BY: (signature)
Lawrence Silver, Attorney
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

RESPONDENT'S REQUEST FOR AN ORDER THAT IN THE EVENT THAT RESPONDENT IS DENIED HIS REQUEST TO BE REPRESENTED BY EITHER A PHYSICIAN-ATTORNEY OR AN ATTORNEY AT ALL STAGES OF THE PROCEEDINGS HEREIN THAT HE ALTERNATIVELY BE ALLOWED REPRESENTATION BY AN ATTORNEY TO APPEAR IN THE HEARINGS TO MAKE LEGAL ARGUMENT, INTRODUCE EVIDENCE, AND CROSS-EXAMINE WITNESSES.

COMES NOW Simon J. Pinhas, M.D., Respondent, by his attorneys of record, Lawrence Silver A Law Corporation, and hereby requests that the Judicial Review Committee permit him to be represented by counsel to the extent of appearing in the hearings to make all legal arguments to protect the record, and to produce evidence, and to cross-examine witnesses.

Respondent and his counsel in support thereof allege the following facts to be true:

1. By letter dated April 30, 1987, in accordance with the Midway Medical Staff Bylaws, Respondent requested a hearing by the Judicial Review Committee. In that same letter, Respondent requested the right to be represented by a physician who is also an attorney at that hearing.

2. By letter dated May 7, 1987, Respondent was served with a Notice of Hearing in this matter and was advised that his request for representation by counsel had been denied.

3. The right to retained counsel is a crucial part to due process and fair procedure as provided to Respondent by the Federal and California Constitutions.

4. Failure to allow Respondent to be represented by counsel to the extent requested above will seriously prejudice his representation and presentation of his case and will be in violation of the California and Federal Constitutions.

WHEREFORE, it is requested that the Judicial Review Committee permit counsel for Respondent to participate in the hearings to the extent of making all legal arguments to protect his record, introduce evidence, and to cross-examine witnesses.

DATED: May 14, 1987

LAWRENCE SILVER
A LAW CORPORATION

BY: (signature)
Lawrence Silver, Attorney
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

RESPONDENT'S MOTION FOR AN ORDER PERMITTING HIM TO BE REPRESENTED BY A PHYSICIAN WHO IS ALSO AN ATTORNEY AT ALL STAGES OF THE PROCEEDINGS HEREIN

COMES NOW Simon J. Pinhas, M.D., Respondent, by his attorneys of record Lawrence Silver A Law Corporation, and hereby requests the Judicial Review Committee enter an order permitting him to be represented by a physician who is also an attorney at all stages of the proceedings herein.

Respondent and his counsel in support thereof allege the following facts to be true:

1. By letter dated April 30, 1987, in accordance with the Midway Medical Staff Bylaws, Dr. Pinhas requested a hearing by the Judicial Review Committee. In that same letter, Dr. Pinhas requested the right to be represented by a physician who is also an attorney at that hearing.

2. By letter dated May 7, 1987, Dr. Pinhas was served with a Notice of Hearing in this matter and was advised that his request for representation by counsel had been denied.

3. The right of an affected practitioner-respondent to be entitled to be accompanied by and/or represented at the Judicial Review Committee hearing by a member of the Medical Staff in good standing is provided by the Midway Hospital Medical Staff Bylaws Article VIII, Section 2b. However, the terms of those Bylaws negate that

right if the member of the Medical Staff chosen is also an attorney.

4. The necessity of a practitioner-respondent to these proceedings to be represented by a physician-advocate is obvious given the technical medical substance of the proceedings, charts, charges, and evidence. But, equally obvious, must be the necessity of representation by counsel because a hearing of this nature of necessity involves a myriad of legal issues, with respect to which respondent-practitioner has no expertise.

5. The right of retained counsel is an essential part of fair procedure and due process as provided to Respondent by the California and Federal Constitutions.

6. The provision in Article VIII, Section 2b of the Midway Medical Center Medical Staff Bylaws with respect to the exclusion of a physician advocate who is also an attorney is unconstitutional and irrational, should be declared a nullity, and be stricken as a regulation of proceedings of this nature.

7. Failure to allow Respondent to be represented by counsel will seriously prejudice his representation and presentation of his case and will be in violation of the California and Federal Constitutions and fair procedure.

WHEREFORE, it is requested that the Judicial Review Committee enter an order permitting Dr. Pinhas the right to be represented by a physician who is an attorney at the hearing and ordering that this physician-attorney be present and argue motions on Respondent's behalf, examine and cross-examine witnesses, may be allowed to introduce evidence, and fully and completely participate in the hearing and protect the record at all stages of the proceedings herein.

DATED: May 14, 1987

LAWRENCE SILVER
A LAW CORPORATION

BY: _____(signature)_____
Lawrence Silver, Attorney
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

RESPONDENT'S MOTION REQUESTING THE JUDICIAL REVIEW COMMITTEE TO ARTICULATE THE FACTS AND CIRCUMSTANCES SURROUNDING THEIR DECISION NOT TO EXERCISE THEIR DISCRETION TO PERMIT RESPONDENT TO BE REPRESENTED BY COUNSEL AT THE HEARING HEREIN

COMES NOW Simon J. Pinhas, M.D., Respondent, and hereby moves the Judicial Review Committee to state the facts and circumstances surrounding their decision not to exercise their discretion to permit respondent to be represented by counsel herein, specifically to provide Respondent in writing:

1. The identity, by name, association and position, of the individual or entity who presented the issue of counsel to each member of the Judicial Review Committee;

2. The identity of the individuals that the Judicial Review Committee spoke to in connection with the decision to deny representation by counsel;

3. The reason the Judicial Review Committee denied Respondent representation by counsel;

4. A statement with respect to whether or not a Judicial Review Committee of Midway Hospital Medical Center has ever exercised their discretion to permit representation by counsel of any respondent in a Judicial Review Committee hearing, together with the reasons therefore.

Respondent and his counsel in support thereof allege the following facts to be true:

1. By letter dated April 30, 1987, in accordance with the Midway Medical Staff Bylaws, Dr. Pinhas requested a hearing by the Judicial Review Committee. Dr. Pinhas by the same letter requested the right to be represented by counsel at all stages of the proceeding. (A copy of the April 30 letter is attached hereto as Exhibit "1".)

2. By letter dated May 7, 1987, a copy of the Notice of Hearing in this matter was delivered to Dr. Pinhas, and *inter alia,* Dr. Pinhas was advised that: "The Judicial Review Committee has been polled with regard to your request for representation by counsel, pursuant to Article VIII, Section 2.b. You are hereby advised that the Committee has unanimously voted not to permit either you or the Medical Staff to be represented by an attorney at law at the hearing." (A copy of the May 7 letter is annexed hereto as Exhibit "2".)

3. The doctrines of fair procedure and due process guaranteed to Respondent by the California and United States Constitutions embody the inherent rights of representation by counsel.

4. The legal issues that are of necessity involved in a hearing of this nature are manifest. Respondent lacks the expertise that representation by counsel would provide.

5. Failure to allow Dr. Pinhas to be represented by counsel will seriously prejudice his representation or presentation of his case and will be in violation of the California and Federal Constitutions.

WHEREFORE, it is requested that the Judicial Review Committee set forth in writing its responses to the four requests made by Respondent above.

DATED: May 14, 1987

LAWRENCE SILVER
A LAW CORPORATION

BY: _____(signature)_____
Lawrence Silver, Attorney
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

RESPONDENT'S MOTION TO HEAR AND DECIDE ALL OF RESPONDENT'S PRE-HEARING MOTIONS AT A REASONABLE TIME PRIOR TO THE COMMENCEMENT OF THE HEARING HEREIN

COMES NOW Simon J. Phinas, M.D., Respondent and hereby moves the Judicial Review Committee to hear and decide all of Respondent's pre-trial motions at a reasonable time prior to the commencement of the taking of evidence — at least one week in advance of the hearing herein.

Respondent and his counsel in support thereof allege the following facts to be true:

1. Motions *in limine* or pre-trial motions are designed to establish the procedures to be followed, and narrow and define the issues substantively to be tried, at the hearing.

2. Rulings made on these matters will affect positions to be taken, at the hearing, and will instruct and guide the preparations necessary for the presentation of evidence.

3. Therefore, as both a logical and practical matter, pre-trial motions should be heard and decided sufficiently in advance of the taking of evidence at the hearing herein.

4. The guarantees of fair procedure and the due process under the California and United States Constitutions mandate adherence to such a sequence of determination respecting pre-trial matters.

WHEREFORE, Respondent requests the Judicial Review Committee to enter a determination that it will hear and determine all of Respondent's pre-trial motions at a reasonable time prior to the commencement of the hearing herein.

DATED: May 14, 1987

LAWRENCE SILVER
A LAW CORPORATION

BY: (signature)
Lawrence Silver, Attorney
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

RESPONDENT'S MOTION FOR AN ORDER DIRECTING THAT ALL WITNESSES WHO ARE INTENDED TO BE CALLED AT THE HEARING BE INSTRUCTED NOT TO DISCUSS THE MATTER WITH ANY MEMBERS OF THE HEARING PANEL OR THE HEARING OFFICER

COMES NOW Simon J. Pinhas, M.D., Respondent and hereby moves the Judicial Review Committee to order that all witnesses who are intended to be called at the hearing be instructed not to discuss the matter with any member of the hearing panel or the Hearing Officer. Respondent and his counsel in support thereof allege the following facts to be true:

1. Due process and fair procedure afforded to respondent by the United States and California Constitutions demand the opportunity for a fair hearing consisting of unbiased, unprejudiced testimony.

2. To preserve both propriety and the appearance of propriety, the record in this matter should be complete and not subject to question or surmise as to the impact any off the record discussions between officials and witnesses may have had.

WHEREFORE, Respondent requests that the Judicial Review Committee enter an order that all witnesses who are intended to be called at the hearing be instructed not

to discuss the matter with any members of the hearing panel.

DATED: May 14, 1987

LAWRENCE SILVER
A LAW CORPORATION

BY: _____(signature)_____
Lawrence Silver, Attorney
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

RESPONDENT'S MOTION REQUESTING THAT ALL REPORTS OF EXPERT WITNESSES TO BE CALLED BY THE HOSPITAL BE SUBMITTED TO RESPONDENT NO LESS THAN 10 DAYS PRIOR TO THEIR BEING CALLED AS WITNESSES

COMES NOW Simon J. Pinhas, M.D., Respondent and hereby moves the Judicial Review Committee to enter an order that all reports of expert witnesses to be called by the Hospital be submitted to him no less than ten (10) days prior to the date they are to be called as witnesses and ordering that the Hospital be precluded from calling any expert witness if such report is not made available.

Respondent and his counsel in support thereof allege the following facts to be true:

1. Expert testimony, as a general rule, is opinion testimony with respect to subject matter that is beyond the ken of the average trier of fact. Despite the expert's lack of the first-hand knowledge of a percipient witness to the event in question, the normal antecedent requirement for the admission of testimony, expert opinion testimony is deemed admissible because it is viewed as useful and beneficial to the trier of fact.

2. Expert testimony, thus, is innately more complex and demanding than ordinary evidence.

3. It is therefore axiomatic that more time is needed to ascertain, analyze and understand the substance and significance of such testimony in order that a party can adequately prepare to address such testimony.

4. Respondent is entitled to the adoption of this procedure by the Judicial Review Committee in order to effectuate his right to fair procedure and due process under the California and United States Constitution.

WHEREFORE, Respondent requests that the Judicial Review Committee enter an order directing that all reports of expert witnesses to be called by the Hospital be submitted to Respondent no less than 10 days prior to their being called as witnesses and that the Hospital be precluded from calling any expert witness if such report is not made available.

DATED: May 14, 1987

LAWRENCE SILVER
A LAW CORPORATION

BY: _____ (signature)
Lawrence Silver, Attorney
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

RESPONDENT'S MOTION REQUESTING A LIST OF ALL WITNESSES TO ANY OF THE EVENTS INVOLVING CHARGES HEREIN; A LIST OF ALL WITNESSES MIDWAY HOSPITAL INTENDS TO CALL HEREIN; A WRITTEN SUMMARY OF THE DIRECT TESTIMONY OF ALL WITNESSES TO BE CALLED; AND THE OPPORTUNITY TO INTERVIEW ALL WITNESSES WHO MAY BE CALLED AGAINST RESPONDENT

COMES NOW Simon J. Pinhas, M.D., Respondent, and hereby moves the Judicial Review Committee to enter an order requiring Midway Hospital Medical Center ("Midway") to provide:

1. A list of all witnesses to any of the events involving the charges, whether or not they are intended to be called at the time of the hearing herein;

2. A list of all witnesses that the Hospital intends to call at the time of the hearing;

3. A written summary of the direct testimony of all witnesses who will be called in the proceedings against Respondent;

And also ordering the Respondent be allowed the opportunity to interview all witnesses that may be called as witnesses against him herein.

Respondent and his counsel in suppport thereof allege the following facts to be true:

1. The hearing in this matter should be devoted exclusively to evidence which is material, relevant and competent.

2. The preparation by the parties herein should therefore be directed at securing and focusing on, only those witnesses and that testimony which will comport with such well-established evidentiary standards.

3. Determining in advance which witnesses will and should be called, and the nature and substance of their testimony, will narrow and delimit the preparation for, and the direct and cross-examination of, those witnesses.

4. This process of discovery will shorten the time in which witnesses need to appear on direct examination and ultimately serve the interest of economy of time and effort to be expended by all parties and officials at the hearing.

WHEREFORE, Respondent requests that the Judicial Review Committee enter an order requiring that:

1. Midway Hospital produce a list of all witnesses to any of the events involving the charges whether or not they are intended to be called at the time of the hearing;

2. Produce a list of all witnesses who Midway intends to call at the time of the hearing;

3. A written summary of the direct testimony of all witnesses who will be called in the proceedings against Respondent;

4. And further ordering that Respondent be granted the opportunity to interview all witnesses who may be called as witnesses against him in the proceedings herein.

DATED: May 14, 1987

LAWRENCE SILVER
A LAW CORPORATION

BY: _____(signature)_____
Lawrence Silver, Attorneys
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

MOTION REQUESTING THAT ALL ADVICE AND INSTRUCTIONS GIVEN BY THE HEARING OFFICER TO THE COMMITTEE ON ANY ISSUE WITH RESPECT TO OR AT THE HEARING BE RECORDED; AND REQUESTING THAT THE HEARING OFFICER BE EXCLUDED FROM DELIBERATIONS AT THE CLOSE OF EVIDENCE

COMES NOW Respondent Simon J. Pinhas, M.D., by his attorneys and hereby requests that the Hearing Officer be excused from the deliberations of the Hearing Committee or, in the alternative, that the advice and instructions given by the Hearing Officer be recorded and in support thereof alleges:

1. The Committee will commence its deliberations upon the close of the evidence.

2. The Hearing Officer was appointed to allow the orderly presentation of evidence and to provide other legal advice, and any advice or instructions given by the Hearing Officer should be duly recorded.

3. The Midway Medical Staff Bylaws provide that the Hearing Officer is not allowed or permitted to cast a vote during the Committee's deliberations.

4. The Hearing Officer has no real role or function to perform during Committee deliberations. The roles of judge, (Hearing Officer), and jury (the Committee) should be carefully preserved and meticulously respected to foster the attitude and atmosphere of impartiality that must be accorded to respondent under the principles of

due process and fair procedure which are guaranteed by the United States and California Constitution.

5. Respondent requests that to serve these interests the Hearing Officer should be excluded from Committee deliberations.

6. In the event that the Hearing Officer's not excluded from Committee deliberations, any advice or instructions he may give to the committee during those deliberations should be duly recorded.

WHEREFORE, it is respectfully requested that the Judicial Review Committee order that any participation by the Hearing Officer on any issue with respect to or at the Hearing be recorded by the court reporter, and further order that the Hearing Officer be excluded from the deliberations of the Committee at the close of evidence herein; or alternately ordering that any advice or instructions given by the Hearing Officer during Committee deliberations to be duly recorded.

DATED: May 14, 1987

LAWRENCE SILVER
A LAW CORPORATION

BY: _____ (signature)
Lawrence Silver, Attorneys
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

RESPONDENT'S REQUEST FOR PERMISSION TO APPEAR WITH COUNSEL

COMES NOW Simon J. Pinhas, M.D., respondent, by his attorneys of record, Lawrence Silver A Law Corporation, and hereby requests that the Judicial Review Committee permit him to be represented by counsel in connection with all pre-hearing proceedings in this matter and at the Judicial Review Committee Hearing commencing on May 26, 1987. Respondent and his counsel in support thereof allege the following facts to be true:

1. By letter dated May 7, 1987, Midway Hospital Medical Center ("Midway") advised Respondent that his request for representation by counsel had been denied in connection with the hearing with respect to respondent's summary suspension of all medical staff, including admitting and surgical, privileges.

2. Article VIII, Section 2 (b) of the Midway Medical Staff Bylaws provides for representation by counsel at the Judicial Review Committee Hearing only if the Judicial Review Committee, in its discretion, permits both sides to be represented. Respondent does not object to the Hospital being represented at the hearing.

3. To the extent that the Judicial Review Committee has discretion to appoint counsel, respondent requests that the Judicial Review Committee exercise it.

4. Respondent requests representation of counsel at all stages of this hearing, including the pre-hearing stage where all motions will be argued. Since Article VIII,

Sections 2(g) and (i) provide the right to submit written argument, argument of counsel should be permitted to be heard in support of these briefs.

5. Respondent requests representation by counsel because of the many legal issues that are of necessity involved in the hearing of this nature. Respondent has no training, understanding, or ability with respect to: (a) reading and interpreting the Bylaws'; (b) selection of members of the Committee; (c) challenging a member of the Committee for bias or prejudice; (d) challenging the hearing officer for bias or prejudice; (e) interpreting the burden of proof; (f) evaluating the admissibility of evidence; (g) objecting to testimony that is offered; (h) preserving the record; (i) making legal arguments; (j) and marshalling arguments in a persuasive way.

6. In addition, cross-examination of witnesses requires great legal skill and courtroom experience. It is anticipated that it will be necessary to cross-examine witnesses to show bias, motive, bad acts, and inconsistent statements. Respondent does not possess the legal skills necessary to accomplish this task.

7. The right to retained counsel is an essential part of fair procedure and due process as provided to Respondent by the California and Federal Constitutions.

8. Failure to allow Respondent to be represented by counsel will seriously prejudice his representation and presentation of this case and will be in violation of the California and Federal Constitutions and fair procedure.

WHEREFORE, it is requested that the Judicial Review Committee permit counsel for Dr. Pinhas to participate on respondent's behalf at all stages of the hearing.

DATED: May 14, 1987

LAWRENCE SILVER
A LAW CORPORATION

By: (signature)
Lawrence Silver, Attorneys
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

MOTION FOR FULL DISCLOSURE OF ALL CHARGES AGAINST RESPONDENT WITH SUFFICIENT PARTICULARITY TO PERMIT THE PREPARATION OF AN ADEQUATE DEFENSE HEREIN

COMES NOW Respondent Simon J. Pinhas, M.D., seeking full disclosure of all charges against him with sufficient particularity that he may investigate and rebut those charges. Respondent and his counsel in support thereof allege the following facts to be true:

1. On May 7, 1987, Midway Hospital Medical Center ("Midway") gave notice of the hearing herein and purported to afford Respondent notice of the charges against him. (A copy of the Notice of Hearing ["the Notice"] is annexed hereto as Exhibit "1".)

2. The Notice sets forth what it terms "specific charges", but the charges are rendered in broad, general language, and reference nearly 128 charts which are cited as support for those charges. The charges and charts, even when studied together, do not offer sufficient detail with which Respondent can adequately prepare a defense.

3. In order to investigate and rebut Midway's charges, Respondent must be able to determine in what particular respect each of the charts allegedly support the charges as proffered by Midway. General allegations, followed by a collocation of chart numbers, do not satisfy this requirement.

4. Moreover, Midway's Notice identifies at least five (5) witnesses, but does not state which charges and/or

charts will be addressed by the testimony of each of those witnesses.

5. Respondent is thus left without sufficient disclosure to determine intelligently and efficiently what any one witness in fact actually knows about a particular charge or a particular chart.

6. As a result, Respondent's ability to prepare for examination of these witnesses is significantly impaired.

7. The dictates of fair procedure and due process quaranteed to Respondent under the California and United States Constitution mandate more complete disclosure with greater particularity than that accorded to Respondent herein.

WHEREFORE, Respondent requests that the Judicial Review Committee enter an order requiring Midway Hospital Medical Center to provide full disclosure of all charges against Respondent with sufficient particularity to permit the preparation of an adequate defense herein.

DATED: May 14, 1987

LAWRENCE SILVER
A LAW CORPORATION

BY: _____(signature)_____
Lawrence Silver, Attorneys
for Simon J. Pinhas, M.D.

[MIDWAY HOSPITAL MEDICAL CENTER
LETTERHEAD DELETED]

May 7, 1987

Simon Pinhas, MD
9033 Wilshire Blvd. #206
Beverly Hills, CA 90211

BY: CERTIFIED MAIL
HAND DELIVERED:
(5/7/87)

Dear Doctor Pinhas:

This letter is in response to your request for a hearing at Midway Hospital Medical Center related to your summary suspension and the recommendation to terminate your medical staff membership. Pursuant to Article VIII, Section I.c., this hearing will be held at 6:30 p.m. on May 12, 1987 in the Pavilion Conference Room.

A Judicial Review Committee has been appointed by the Chief of Staff. Its Chairman is Ellis Berkowitz, MD, and its members are: John Hofbauer, MD; Jay Jordan, MD: Debra Judelson, MD; Alan Kessler, MD; Dwight Makoff, MD and Stephen Seiff, MD. These committee members have been advised not to discuss this matter with you or any other member of the Hospital's Medical Staff.

The decisions to summarily suspend and to terminate your membership at Midway Hospital Medical Center were based on reviews of your patient records involving ophthalmological surgeries conducted at this Hospital in 1987. These reviews concluded that your conduct of pa-

tient care was below the acceptable standard of care in this Hospital.

The specific charges that support this conclusion, and the specific charts that support these charges are as follows:

1. JUDGMENT TO PROCEED WITH SURGERY NOT WITHIN STANDARD OF CARE IN HOSPITAL.

A. No History and Physical on patient chart prior to surgery:

Chart #7071027	Chart #7066244
Chart #7070713	Chart #7063199
Chart #7070489	Chart #7059728
Chart #7070403	
Chart #7070179	Chart #7029896/
Chart #7067615	2885069

B. Incomplete Pre-Operative workup:

Chart #7087136	Chart #7075332
Chart #7084633	Chart #7073054
Chart #7084609	Chart #7072376
Chart #7084595	Chart #7070543
Chart #7083955	Chart #7070004
Chart #7082142	Chart #7069979
Chart #7081316	Chart #7068204
Chart #7079249	Chart #7067836
Chart #7078307	Chart #7066244
Chart #7078293	Chart #7065167
Chart #7078285	Chart #7065094
Chart #7078145	Chart #7063059
Chart #7078072	Chart #7062664
Chart #7075979	Chart #7059639
Chart #7075936	Chart #7059612
Chart #7075928	Chart #7057172
Chart #7075375	Chart #7051832

C. Surgery contraindicated by patients' medical condition:

Chart #7087365
Chart #7087136
Chart #7084663
Chart #7084609
Chart #7083998
Chart #7082142
Chart #7081316
Chart #7079249
Chart #7078102
Chart #7075936
Chart #7075529
Chart #7072392
Chart #7072376
Chart #7070446
Chart #7068204
Chart #7065183/2909006
Chart #7065094
Chart #7065035
Chart #7062664
Chart #7062664
Chart #7059639
Chart #7059612
Chart #7056915
Chart #7054459
Chart #7029896/2885069

2. FAILURE TO OBTAIN REQUIRED CONSENT FOR PROCEDURE PERFORMED.

A. Lack of appropriate consent for procedure performed:

Chart #7068204
Chart #7067674
Chart #7066244
Chart #7065086/2908727
Chart #7063318

B. Lack of informed consent for surgery:

Chart #7085788
Chart #7084099
Chart #7081936
Chart #7081928
Chart #7079397
Chart #7079389
Chart #7078293
Chart #7078129
Chart #7075456
Chart #7072422
Chart #7068182
Chart #7068107
Chart #7065019
Chart #7062699
Chart #7057172

C. No IntraOcular Lens Consent:

Chart #7084692
Chart #7084684
Chart #7083947
Chart #7082142
Chart #7079273
Chart #7072724
Chart #7070713
Chart #7070535
Chart #7067585
Chart #7066244
Chart #7065153
Chart #7065132
Chart #7063086/08727
Chart #7063318
Chart #7062699
Chart #7062672
Chart #7062605
Chart #7062532
Chart #7059639
Chart #7057687
Chart #7057563
Chart #7057172
Chart #7029896/2885069

3. NO ASSISTANT AT SURGERY AS REQUIRED BY MEDICAL STAFF BYLAWS:

Chart #7057644
Chart #7057636
Chart #7057628
Chart #7057563
Chart #7057555
Chart #7057547

The Judicial Review Committee has been polled with regard to your requests for representation by counsel, pursuant to Article VIII., Section 2.b. You are hereby advised that the Committee has unanimously voted not to permit either you or the Medical Staff to be represented by an attorney at law at the hearing. You are entitled, as that section indicates, to be represented by a member of the Medical Staff in good standing. If you will be represented by a staff member, please inform the undersigned of the identity of that person so that further communication regarding this matter can also be directed to that person.

A Hearing Officer, Richard Posell, Esq., has been appointed by the Governing Board. Mr. Posell is a part-

ner in the law firm of Shapiro, Posell & Close and is experienced at conducting hearings of this type at hospitals. A certified shorthand reporter has also been ordered to maintain a record of the hearing.

If you wish to review the charts in question prior to the hearing, please contact Peggy Farber RN, Director of Quality Assurance at 932-5231 or 932-5022 to make these arrangements. If copies of these records are requested, arrangements can be made with Ms. Farber after you have completed the appropriate Non-Disclosure Agreement. Copies will be handled at your own expense.

The hearing will be conducted pursuant to the provisions of Article VIII of the Midway Hospital Medical Center Medical Staff Bylaws. Those Bylaws do not provide for pre-hearing discovery of any documents or information related to the proceedings. Additionally, the Hospital does not have subpoena power or other powers to compel any one to testify at a medical staff hearing.

While the Medical Staff is not required under the Bylaws to provide you with a list of witnesses it intends to call at the hearing, the following is a list of those persons who are currently expected to testify on behalf of the Medical Staff at the hearing: Alan Friedman, MD; Arthur Lurvey, MD; Jonathan Macy, MD; James Salz, MD and Maurice Schmir, MD. The Medical Staff reserves the right to add to this list, or delete from it at any time. Please provide the undersigned with a list of your witnesses as soon as possible.

Very truly yours,

Mitchell Feldman
Regional Vice-President

cc: Lawrence Silver, Esq.

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

RESPONDENT'S MOTION TO EXCLUDE FROM TESTIMONY ANY WITNESS WHO WILL NOT SUBMIT TO AN INTERVIEW BY RESPONDENT AND HIS COUNSEL

COMES NOW, Simon J. Pinhas, M.D., Respondent, and hereby moves the Judicial Review Committee to exclude from testimony any witness who will not submit to an interview by Respondent and his counsel, and in support thereof alleges the following facts to be true:

1. On May 7, 1987, Respondent received a letter from Midway Hospital and Medical Center ("Midway"). It was stated that at least 5 witnesses would be called to testify on behalf of the Medical Staff at the hearings now scheduled for May 26, 1987.

2. Respondent believes and alleges that all 5 witnesses are either employed by Midway or are holders of staff privileges accorded by Midway.

3. In order to prepare for the hearing in which Midway seeks to terminate his staff privileges, it is necessary for Respondent to know what these witnesses will say about his conduct.

4. Respondent has never had the opportunity to interview these 5 witnesses.

5. None of these witnesses have ever previously testified against Respondent. Because Respondent was not represented by counsel he was unable to adequately cross-examine even these witnesses.

6. Midway can compel these witnesses to be interviewed by Respondent and his counsel pursuant to the Bylaws which require every member of the Medical Staff to insure fair procedure to all other members. Fairness would dictate that witnesses so closely connected to one party not be permitted to testify unless Respondent has an opportunity to interview each of them.

7. The right to a fair hearing involves the right to confront and cross-examine opposing witnesses. A necessary corollary of this basic right is the right to interview witnesses to learn what they will say.

8. The California Constitution as well as the U.S. Constitution and the Midway Medical Staff bylaws guarantee Respondent a fair hearing.

WHEREFORE it is requested that the Judicial Review Committee issue an order that no witness be permitted to testify on behalf of the Medical Staff at the Judicial Review Committee hearing unless they submit to an interview by Respondent and his counsel.

DATED: May 14, 1987

LAWRENCE SILVER
A LAW CORPORATION

BY: _____(signature)_____
Lawrence Silver, Attorneys
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

RESPONDENT'S MOTION REQUESTING DOCUMENTS FOR THE PURPOSES OF EXAMINATION, REVIEW, AND DUPLICATION

COMES NOW Simon J. Pinhas, M.D., Respondent and hereby moves for the Judicial Review Committee to order the production to Respondent for purposes of examination and duplication at a time reasonably prior to the hearing in this matter of the following documents:

1. The originals of all charts in their full, complete, and unaltered state, which have been used or considered in connection with the bringing of charges against Respondent;

2. The Minutes of any meeting of any members of the staff of Midway Hospital Medical Center ("Midway") or its Medical Staff in connection with considering to bring and the bringing of any charges against Respondent;

3. All writings, as the term is defined by Section 250 of the California Evidence Code, and all copies which in any way are different therefrom, regarding any communication respecting Respondent's medical staff privileges or his performance as a physician at Midway;

4. All writings which are exculpatory to any charges or any sanction which might be sought to be imposed;

5. All communications with the Department of Health Services or any governmental agency regarding Respondent's practice of medicine; and all contracts between Midway or Summit Health, Ltd., or any affiliates, parents, or subsidiaries thereof, with any member of the Medical Staff for purposes of determining bias, interest, or for

purposes of impeachment or any other appropriate evidentiary purpose.

WHEREFORE, it is requested that the Judicial Review Committee issue an order directing the production for purposes of Respondent's examination and duplication, at a reasonable time before the hearing herein, of the documents listed as items 1 through 5, inclusive above.

DATED: May 14, 1987

LAWRENCE SILVER
A LAW CORPORATION

By: _____(Signature)_____
Lawrence Silver, Attorneys
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

RESPONDENT'S MOTION REQUESTING AN ORDER COMPELLING THE HEARING OFFICER ATTORNEY POSELL TO ANSWER RESPONDENT'S REQUESTS FOR INFORMATION, OR, ALTERNATIVELY, DISQUALIFYING THE HEARING OFFICER AND APPOINTING A RETIRED JUDGE OF THE SUPREME COURT OR A HEARING OFFICER OF UNQUESTIONABLE IMPARTIALITY

COMES NOW Simon J. Pinhas, M.D., Respondent, and hereby moves for the Judicial Review Committee to rule and direct that the Hearing Officer in this matter, Richard E. Posell, a partner in the law firm of Shapiro, Posell & Close, respond in full to Respondent's requests for information, or be disqualified from presiding at the hearing herein. Respondent and his counsel in support thereof allege the following facts to be true:

1. On May 7, 1987, Respondent was informed by letter that Mr. Richard Posell, Esq., had been appointed by the governing board as hearing officer herein, Exhibit "A" attached hereto.

2. By letter dated May 8, 1987, which was hand-delivered to Mr. Posell at his offices at Shapiro, Posell & Close, Respondent, in order to determine whether to file a challenge to Mr. Posell's sitting as hearing officer, requested that Mr. Posell provide Respondent with certain information, Exhibit "B" attached hereto.

3. Respondent requested:

a. A full and complete recitation of any and all discussions Mr. Posell has had, or knowledge or information Mr. Posell has, with respect to this matter;

b. A full and complete recitation of any and all relationships and/or involvement Mr. Posell has had, prior to this matter, with Midway Hospital and/or Summit Health Ltd.;

c. A full and complete recitation of any and all other medical peer review hearings in which Mr. Posell has been involved;

d. A full and complete recitation of any and all business or matters referred to Mr. Posell by Weissburg & Aronson [Summit Health Ltd.'s counsel];

e. A full and complete recitation of any and all business or matters referred by Mr. Posell to Weissburg & Aronson;

f. A statement as to whether or not Mr. Posell was appointed as Hearing Officer in this matter by, at the behest or request of Weissburg & Aronson;

g. The amount of compensation Mr. Posell will receive in connection with his appointment and functions as Hearing Officer in this matter;

h. The identification of any hospitals, or other health care providers that Mr. Posell or his law firm represents; and

i. Any reason why Mr. Posell might not be able to fully protect Respondent's rights or be fair to Respondent in the hearing of this matter.

4. By letter, dated May 11, 1987, Mr. Posell stated that his appointment as hearing officer in this matter was made in accordance with the Bylaws of Midway Hospital, which provide in Article VIII, Section 2d, that a hearing officer may be an attorney at law. Mr. Posell stated that he was indeed an attorney at law licensed to practice in the State of California. Mr. Posell went on to say that there was no reason why he could not be fair to all of the parties in this matter, and that he intends to be so. Finally, Mr. Posell concluded his letter by stating that it would be inappropriate for him to respond further to Respondent's May 8, 1987 letter, attached hereto as Exhibit "C".

5. The response provided by Mr. Posell is clearly inadequate.

6. The information requested by Respondent is essential in order for him to investigate Mr. Posell's impartiality and determine whether to file a challenge to the appointment of Mr. Posell as hearing officer in this matter.

7. Fair opportunity to be heard as guaranteed to Respondent by the Constitutions of California and the United States and fair procedure requires at the very minimum a neutral and detached hearing officer whose impartiality may not be questioned.

8. In the event the Judicial Review Committee decides not to enter an order compelling Mr. Posell to answer Respondent's requests for information, or does so enter the order requested and Mr. Posell refuses to respond or responds incompletely, Respondent asks the Judicial Review Committee to enter an order disqualifying Mr. Posell and appointing in his stead a retired Judge of the Supe-

rior Court or a hearing officer of similar unquestionable impartiality.

WHEREFORE, Respondent requests that the Judicial Review Committee enter an order compelling hearing officer, Richard E. Posell, to answer Respondent's request for information set forth above in paragraph 3, subparagraphs a through i, inclusive; or alternatively, enter an order disqualifying Mr. Posell and appointing a retired judge of the Superior Court or a hearing officer of similar unquestionable impartiality.

DATED: May 14, 1987

LAWRENCE SILVER
A LAW CORPORATION

BY: _____ (signature)
Lawrence Silver, Attorneys
for Simon J. Pinhas, M.D.

[MIDWAY HOSPITAL MEDICAL CENTER
LETTERHEAD DELETED]

May 7, 1987

Simon Pinhas, MD
9033 Wilshire Blvd. # 206
Beverly Hills, CA 90211

BY: CERTIFIED MAIL
HAND DELIVERED:
(5/7/87)

Dear Doctor Pinhas:

This letter is in response to your request for a hearing at Midway Hospital Medical Center related to your summary suspension and the recommendation to terminate your medical staff membership. Pursuant to Article VIII, Section I.c., this hearing will be held at 6:30 p.m. on May 12, 1987 in the Pavilion Conference Room.

A Judicial Review Committee has been appointed by the Chief of Staff. Its Chairman is Ellis Berkowitz, MD, and its members are: John Hofbauer, MD; Jay Jordan, MD; Debra Judelson, MD; Alan Kessler, MD; Dwight Makoff, MD and Stephen Seiff, MD. These committee members have been advised not to discuss this matter with you or any other member of the Hospital's Medical Staff.

The decisions to summarily suspend and to terminate your membership at Midway Hospital Medical Center were based on reviews of your patient records involving ophthalmological surgeries conducted at this Hospital in 1987. These reviews concluded that your conduct of pa-

EXHIBIT "A"

tient care was below the acceptable standard of care in this Hospital.

The specific charges that support this conclusion, and the specific charts that support these charges are as follows:

1. JUDGMENT TO PROCEED WITH SURGERY NOT WITHIN STANDARD OF CARE IN HOSPITAL.

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Chart #7070489	Chart #7059728
Chart #7070403	Chart #7059574
Chart #7070179	Chart #7029896/
Chart #7067615	2885069

B. Incomplete Pre-Operative workup:

Chart #7087136	Chart #7075332
Chart #7084633	Chart #7073054
Chart #7084609	Chart #7072376
Chart #7084595	Chart #7070543
Chart #7083955	Chart #7070004
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Chart #7078145	Chart #7063059
Chart #7078072	Chart #7062664
Chart #7075979	Chart #7059639
Chart #7075936	Chart #7059612
Chart #7075928	Chart #7057172
Chart #7075375	Chart #7051832

C. Surgery contraindicated by patients' medical condition:

Chart #7087365	Chart #7070446
Chart #7087136	Chart #7068204
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Chart #7083998	Chart #7065094
Chart #7082142	Chart #7065035
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Chart #7075936	Chart #7059612
Chart #7075529	Chart #7056915
Chart #7072392	Chart #7054459
Chart #7072376	Chart #7029896/
	2885069

2. FAILURE TO OBTAIN REQUIRED CONSENT FOR PROCEDURE PERFORMED.

A. Lack of appropriate consent for procedure performed:

Chart #7068204	Chart #7065086/
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Chart #7066244	Chart #7063318

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Chart #7081936	Chart #7072422
Chart #7081928	Chart #7068182
Chart #7079397	Chart #7068107
Chart #7079389	Chart #7065019
Chart #7078293	Chart #7062699
	Chart #7057172

C. No IntraOcular Lens Consent:

Chart #7084692	Chart #7063086/
Chart #7084684	2908727
Chart #7083947	Chart #7063318
Chart #7082142	Chart #7062699
Chart #7079273	Chart #7062672
Chart #7072724	Chart #7062605
Chart #7070713	Chart #7062532
Chart #7070535	Chart #7059639
Chart #7067585	Chart #7057687
Chart #7066244	Chart #7057563
Chart #7065153	Chart #7057172
Chart #7065132	Chart #7029896/
	2885069

3. NO ASSISTANT AT SURGERY AS REQUIRED BY MEDICAL STAFF BYLAWS:

Chart #7057644	Chart #7057563
Chart #7057636	Chart #7057555
Chart #7057628	Chart #7057547

The Judicial Review Committee has been polled with regard to your requests for representation by counsel, pursuant to Article VIII., Section 2.b. You are hereby advised that the Committee has unamimously voted not to permit either you or the Medical Staff to be represented by an attorney at law at the hearing. You are entitled, as that section indicates, to be represented by a member of the Medical Staff in good standing. If you will be represented by a staff member, please inform the undersigned of the identity of that person so that further communication regarding this matter can also be directed to that person.

A Hearing Officer, Richard Posell, Esq., has been appointed by the Governing Board. Mr. Posell is a partner in the law firm of Shapiro, Posell & Close and is experienced at conducting hearings of this type at hospitals. A certified shorthand reporter has also been ordered to maintain a record of the hearing.

If you wish to review the charts in question prior to the hearing, please contact Peggy Farber RN, Director of Quality Assurance at 932-5231 or 932-5022 to make these arrangements. If copies of these records are requested, arrangements can be made with Ms. Farber after you have completed the appropriate Non-Disclosure Agreement. Copies will be handled at your own expense.

The hearing will be conducted pursuant to the provisions of Article VIII of the Midway Hospital Medical Center Medical Staff Bylaws. Those Bylaws do not provide for pre-hearing discovery of any documents or information related to the proceedings. Additionally, the Hospital does not have subpoena power or other powers to compel any one to testify at a medical staff hearing.

While the Medical Staff is not required under the Bylaws to provide you with a list of witnesses it intends to call at the hearing, the following is a list of those persons who are currently expected to testify on behalf of the Medical Staff at the hearing: Alan Friedman, MD; Arthur Lurvey, MD; Jonathan Macy, MD; James Salz, MD and Maurice Schmir, MD. The Medical Staff reserves the right to add to this list, or delete from it at any time.

Please provide the undersigned with a list of your witnesses as soon as possible.

Very truly yours,

Mitchell Feldman
Regional Vice-President

cc: Lawrence Silver, Esq.

[LAWRENCE SILVER A LAW CORPORATION
LETTERHEAD DELETED]

May 8, 1987

Richard Posell, Esq.
Shapiro, Posell & Close
2029 Century Park East
Suite 2600
Los Angeles, CA 90067

HAND DELIVERY

Re: Matter of Simon J. Pinhas, M.D.

Dear Mr. Posell:

We have been advised that you have been appointed by the Midway Hospital Governing Board to act as the Hearing officer in connection with the Judicial Review Committee hearing regarding the summary suspension and recommended termination of medical staff membership of Simon J. Pinhas, M.D.

In this respect, we request in order to determine whether to file a challenge to your sitting as hearing officer:

1. A full and complete recitation of any and all discussions you have had, or knowledge or information you have, with respect to this matter;

2. A full and complete recitation of any and all relationships and/or involvement you have had, prior to this matter, with Midway Hospital and/or Summit Health, Ltd.;

EXHIBIT "B"

3. A full and complete recitation of any and all other medical peer review hearings in which you have been involved;

4. A full and complete recitation of any and all business or matters referred to you by Weissburg & Aronson;

5. A full and complete recitation of any and all business or matters referred by you to Weissburg & Aronson;

6. A statement as to whether or not you were appointed as Hearing Officer in this matter by, at the behest or request of Weissburg & Aronson; and

7. The amount of compensation you will receive in connection with your appointment and functions as Hearing Officer in this matter.

8. The identification of any hospitals, or other health care providers that you or your firm represents.

9. Any reason why you might not be able to fully protect Dr. Pinhas' rights or be fair to him in the hearing of this case.

Please find enclosed a copy of Respondent's objections to Notice of Hearing dated May 7, 1987.

Sincerely,

Lawrence Silver

cc: Simon Pinhas, M. D.
with enclosure

LS: wbr

[SHAPIRO, POSELL & CLOSE LETTERHEAD DELETED]

May 11, 1987

HAND DELIVERY

Lawrence Silver, Esq.
9100 Wilshire Boulevard
Suite 360
Beverly Hills, CA 90212

Re: Matter of Simon J. Pinhas, M.D.

Dear Mr. Silver:

I am in receipt of your letter of May 8, 1987, which was hand delivered to my office on the afternoon of May 8, 1987. As you know, my appointment as hearing officer in connection with the Judicial Review Committee hearing requested by Simon J. Pinhas, M.D. was made in accordance with the Bylaws of Midway Hospital. Those Bylaws provide, in Article VIII, Section 2d, that a hearing officer may be an attorney at law. There are no other requirements. I can assure you that I am an attorney at law licensed to practice in the state of California.

Furthermore, there is no reason why I cannot be fair to all of the parties in this matter, and I intend to be so. It would be inappropriate for me to respond further to your May 8, 1987 letter.

Very truly yours,

SHAPIRO, POSELL & CLOSE

Richard E. Posell

REP/hh

cc: Midway Hospital Medical Staff Office

EXHIBIT "C"

[SHAPIRO, POSELL & CLOSE LETTERHEAD DELETED]

May 18, 1987

Lawrence Silver, Esq.
9100 Wilshire Boulevard
Suite 260
Beverly Hills, CA 90212

Re: Simon J. Pinhas, M.D.

Dear Mr. Silver:

On May 7, 1987 Dr. Pinhas was advised that the Judicial Review Committee had unanimously voted not to permit either Dr. Pinhas or the medical staff to be represented by an attorney at law at the hearing. Notwithstanding that determination, you have continued to barrage this office with motions and requests on behalf of your client.

Neither the hearing officer nor the Judicial Review Committee may consider motions or requests made "in any phase of the hearing or appeal procedure by an attorney at law unless the hearing committee, in its discretion, permits both sides to be represented by legal counsel" (Bylaw Article VIII, Section 2(b)). Your continued participation is a violation of the foregoing Bylaw. Please refrain from filing and serving further documents in this matter.

Very truly yours,

Richard E. Posell

REP/hh

cc: Mark Kadzielski, Esq.
Midway Hospital Medical Staff

EXHIBIT "K"

[LAWRENCE SILVER A LAW CORPORATION LETTERHEAD DELETED]

May 19, 1987

VIA TELECOPIER AND MAIL

Richard Posell, Esq.
Shapiro, Posell & Close
2029 Century Park East
Suite 2600
Los Angeles, CA 90067

Re: Matter of Simon J. Pinhas, M.D.

Dear Mr. Posell:

In the years that I represented hospitals in medical staff matters and in the years that I have represented physicians regarding medical staff privileges, no one has ever suggested, much less ruled, that the attorney cannot advise and act on behalf of the physician except during the actual hearing itself. Your ruling is a first. This ruling further supports the reasons why I believe you should be disqualified from continuing as the hearing officer in this case. You are not impartial as you were and are required to be.

I request that you answer the following questions:

1. Did you and Mr. Kadzielski of Weissburg & Aronson, and/or counsel to Summit Corporation and Midway Hospital discuss my motions before you signed the letter dated May 18, 1987? If so, would you disclose the entire content of those conversion(s).

2. Are you striking all of the motions I made on Dr. Pinhas' behalf?

EXHIBIT "L"

3. Are you precluding me from further representing Dr. Pinhas in the proceedings at the Hospital?

Sincerely,

Lawrence Silver

cc: Mark Kadzielski
Simon J. Pinhas, M.D.

[SHAPIRO, POSELL & CLOSE LETTERHEAD DELETED]

May 21, 1987

Simon J. Pinhas, M.D.
9033 Wilshire Boulevard
Suite 206
Beverly Hills, CA 90211

Re: The Matter of Simon J. Pinhas, M.D./Judicial Review Committee of Midway Hospital Medical Center

Dear Dr. Pinhas:

I am in receipt of 15 motions and requests made by you in connection with the above hearing now scheduled for May 26, 1987. Although these motions and requests are virtually identical to those which were served upon me on the letterhead of your attorney, and although it is clear from the bylaws that you may not be "represented in any phase of the hearing . . . procedure by an attorney at law unless the hearing committee in its discretion, permits" it (which it has not done), I have elected to rule on several of the motions and requests as follows:

1. Respondent's Request for Permission to Appear with Counsel.

The Judicial Review Committee has exercised its discretion not to permit either side to be represented by counsel. This motion is denied.

2. Respondent's Motion Requesting a List of All Witnesses to Any of the Events Involving Charges Herein: A List of All Witnesses Midway Hospital Intends to Call

Herein; A Written Summary of the Direct Testimony of All Witnesses to be Called; and the Opportunity to Interview All Witnesses Who May Be Called Against Respondent.

Both parties shall exchange a list of all witnesses which either intends to call at the time of the hearing, and a *brief* summary of the subject matter of their testimony by 4:00 p.m., Friday, May 22, 1987.

3. Respondent's Motion for an Order Directing that all Witnesses Who are Intended to be Called at the Hearing be Instructed not to Discuss the Matter with Any Members of the Hearing Panel or the Hearing Officer.

This motion is denied.

4. Respondent's Request for an Order that in the Event that Respondent is Denied the Right to Representation by Either a Physician-Attorney or an Attorney at All Stages of the Proceeding Herein that He Alternatively be Allowed Representation by an Attorney to Appear in the Hearings to Make Legal Argument, Introduce Evidence, and Cross-Examine Witnesses.

This motion is denied.

5. Respondent's Request that in the Event that He is Denied the Right to Representation by a Physician-Attorney at All Stages of the Proceedings or by Attorney Limited to Certain Functions in the Proceeding that Alternatively Responded by Granted the Opportunity to Have His Attorney Sit in the Hearing and Advise Him Without Actually Participating in that Hearing.

Since the presence of an attorney at the hearing to advise respondent would constitute "representation", this motion is denied.

6. Respondent's Motion for an Order Permitting Him to be Represented by a Physician Who is also an Attorney at all Stages of the Proceedings Herein.

The Bylaws at Article VIII, Section 2(b) provide: "The affected practitioner shall be entitled to be accompanied by and/or represented at the hearing by a member of the medical staff in good standing, except if the member of the medical staff is also an attorney." Based upon the foregoing Bylaw provision, this motion is denied.

7. Respondent's Motion Requesting that All Reports of Expert Witnesses to be Called by the Hospital be Submitted to Respondent No Less than 10 Days Prior to Their Being Called as Witnesses.

Since the service date of the above motion was May 20, 1987, the motion would be impossible to fulfill without a further continuance which has not been requested. The hearing officer's order with respect to the witness list exchange shall apply equally to expert as well as percipient witnesses.

A ruling on all other motions will be deferred to the time of the hearing. No further pre-hearing motions will be entertained. If you wish to bring any other matters to the attention of the hearing officer, I assure you that I will give them due consideration at the time of the hearing.

Very truly yours,

SHAPIRO, POSELL & CLOSE

Richard E. Posell

REP/hh
cc: Midway Hospital Medical Center

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

DECLARATION OF MARINA NINO REGARDING CONVERSATION WITH PEGGY FARBER

I, Marina Nino, declare that:

1. I am an adult over the age of 21 and I make this declaration to record with Peggy Farber said to me and others on June 1, 1987.

2. On June 1, 1987, Peggy Farber of Midway Hospital's Risk Management Section approached a table in the cafeteria where Marina Nino, Barbara Aviles, Rose Pierce and Suprani Watana were sitting at approximately 6:30 p.m. while we were waiting to be called into the hearing regarding Dr. Pinhas' privileges. Ms. Farber said the following:

a. "I want to prepare you for what you are getting yourselves into."

b. "You don't have to do this."

c. "You can leave if you want to. You will not be persecuted or harassed if you leave."

d. "You are on your own, the hospital will not pay for your time."

e. "It is going to be like a court in there. There is a court stenographer. Everything you say will be taken down and under oath."

f. "You will each be called, one by one, you will not be allowed to go in as a group."

g. "You will be questioned in there by doctors, you will be cross-examined."

3. Rose Pierce asked Ms. Farber to leave because she was scaring us.

4. Shortly thereafter Kay Deol came over to the table and she and Peggy Farber stayed around and hovered around the cafeteria for the rest of the evening.

5. At Los Angeles, California on June 9, 1987, I declare under penalty of perjury that the foregoing facts are true and correct and that I would competently testify thereto if called as a witness.

(signature)
MARINA NINO

JUDICIAL REVIEW COMMITTEE OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

DECLARATION OF BARBARA AVILES REGARDING CONVERSATION WITH PEGGY FARBER

I, Barbara Aviles, declare that:

1. I am an adult over the age of 21 and I make this Declaration to record what Peggy Farber said to me and others on June 1, 1987.

2. On June 1, 1987, Peggy Farber of Midway Hospital's Risk Management Section approached a table in the cafeteria where Marina Nino, Barbara Aviles, Rose Pierce and Suprani Watana were sitting at approximately 6:30 p.m. while we were waiting to be called into the hearing regarding Dr. Pinhas' privileges. Ms. Farber said the following:

a. "I want to prepare you for what you are getting yourselves into."

b. "You don't have to do this."

c. "You can leave if you want to. You will not be persecuted or harassed if you leave."

d. "You are on your own, the hospital will not pay for your time."

e. "It is going to be like a court in there. There is a court stenographer. Everything you say will be taken down and under oath."

f. "You will each be called, one by one, you will not be allowed to go in as a group."

g. "You will be questioned in there by doctors, you will be cross-examined."

3. Rose Pierce asked Ms. Farber to leave because she was scaring us.

4. Shortly thereafter Kay Deol came over to the table and she and Peggy Farber stayed around and hovered around the cafeteria for the rest of the evening.

5. At Los Angeles, California on June 9, 1987, I declare under penalty of perjury that the foregoing facts are true and correct and that I would competently testify thereto if called as a witness.

(signature)
Barbara Aviles

[SIMON J. PINHAS, M.D., INC.
LETTERHEAD DELETED]

June 1, 1987

Mitchell Feldman
Regional Vice-President
5925 San Vicente Blvd.
Los Angeles, CA 90019

HAND DELIVERED

Dear Mr. Feldman,

Pursuant to the bylaws of the Medical Staff of Midway Hospital, I hereby request that you be present at the hearings regarding my medical staff privileges. I request that you be present on Tuesday June 2 at 6:30 P.M. in the Pavilion Conference room to present testimony. Your failure to appear will be prejudicial to me and in violation of the bylaws and fair procedure.

Sincerely,

Simon J. Pinhas, M.D.

EXHIBIT "O"

[SIMON J. PINHAS, M.D., INC.
LETTERHEAD DELETED]

June 1, 1987

Arthur Lurvey, M.D.
Chief of Medical Staff
435 North Roxbury Drive
Beverly Hills, CA

HAND DELIVERED

Dear Doctor Lurvey,

Pursuant to the bylaws of the Medical Staff of Midway Hospital, I hereby request that you be present at the hearings regarding my medical staff privileges. I request that you be present on Tuesday June 2 at 6:30 P.M. in the Pavilion Conference room to present testimony. Your failure to appear will be prejudicial to me and in violation of the bylaws and fair procedure.

Sincerely,

Simon J. Pinhas, M.D.

[SIMON J. PINHAS, M.D., INC.
LETTERHEAD DELETED]

June 8, 1987

Mitchell Feldman
Regional Vice-President
5925 San Vicente Blvd.
Los Angeles, CA 90019

HAND DELIVERED

Dear Mr. Feldman,

On June 2nd Dr. Miller and I Searched for you at the Midway Hospital cafeteria and the Pavilion Conference Room and we were unable to find you. Since you did not comply with my request as explained in my letter dated June 1, 1987. I again ask, Pursuant to the bylaws of the medical staff of Midway Hospital, I hereby request that you be present at the hearings regarding my medical staff privileges. I request that you be present on Tuesday June 9, 1987 at 6:30 P.M. in the Pavilion Conference Room to present testimony. Your failure to appear will be prejudicial to me and in violation of the bylaws and fair procedure.

Sincerely,

Simon J. Pinhas, M.D.

cc: Richard Posell, Esq.
Gilbert Perlman, M.D.

[SIMON J. PINHAS, M.D., INC.
LETTERHEAD DELETED]

June 8, 1987

Arthur Lurvey, M.D.
Chief of Medical Staff
435 North Roxbury Drive
Beverly Hills, CA 90211

HAND DELIVERD

Dear Doctor Lurvey,

On June 2nd Dr. Miller and I searched for you at the Midway Hospital cafeteria and the Pavilion Conference Room and we were unable to find you. Since you did not comply with my request as explained in my letter dated June 1, 1987. I again ask, pursuant to the bylaws of the medical staff of Midway Hospital, I hereby request that you be present at the hearings regarding my medical staff privileges. I request that you be present on Tuesday June 9, 1987 at 6:30 P.M. in the Pavilion Conference Room to present testimony. Your failure to appear will be prejudicial to me and in violation of the bylaws and fair procedure.

Sincerely,

Simon J. Pinhas, M.D.

cc: Richard Posell, Esq.
Gilbert Perlman, M.D.

REPORT AND DECISION OF JUDICIAL REVIEW COMMITTEE IN THE MATTER OF SIMON J. PINHAS, M.D.

June 12, 1987

The Judicial Review Committee of Midway Hospital Medical Center convened on May 26, May 27, June 1, June 2, June 9, and June 12, 1987 to hear the appeal of Simon J. Pinhas, M.D. to his summary suspension issued by the Medical Executive Committee on April 13, 1987 and the Statement of Charges dated May 7, 1987.

Members of the Committee were Ellis Berkowitz, M.D., Chairman, John Hofbauer, M.D., Jay Jordan, M.D., Debra Judelson, M.D. Alan Kessler, M.D., Stephen Seiff, M.D. and Michael Weiss, M.D.

The hearing officer appointed by the hospital was Richard E. Posell, Esq.

Following the presentation of oral and documentary evidence and opening and closing statements, the Judicial Review Committee deliberated and made the following decision:

DECISION

Dr. Pinhas has not established by the preponderance of the evidence that the decision of the Medical Executive Committee to summarily suspend him was: (1) arbitrary or unreasonable; and (2) should not be sustained by the evidence. This decision is based on the following discussion of each charge.

EXHIBIT "P"

1. CHARGE I.A.

DESCRIPTION

No history and physical examination on chart prior to surgery.

DISCUSSION

This charge was not sustained by the evidence. In all cases but one, there was ample evidence to show that a history and physical examination had been done prior to surgery even though the document did not appear on the chart when reviewed. One chart out of over 300 charts reviewed did not show willful disregard of hospital bylaws or policies, or substantial likelihood of immediate injury or damage to the health and safety of patients.

2. CHARGE I.B.

DESCRIPTION

Incomplete pre-operative work-up.

DISCUSSION

This charge was not sustained by the evidence. The evidence demonstrated that Dr. Pinhas met the standard of care in his preoperative work-up as provided in the Rules and Regulations of the hospital regarding local anesthesia and regional block anesthesia in surgery. A chest x-ray or electrocardiogram is not required for surgery as he performed it. If in some cases the spirit of the rules was broken, the letter of the rules was not. Dr. Pinhas did not willfully disregard hospital bylaws or policies nor was there a substantial likelihood of immediate injury or damage to the health or safety of patients.

3. CHARGE I.C.

DESCRIPTION

Surgery contraindicated by medical condition.

DISCUSSION

This charge was sustained by the evidence. Chronically and acutely ill patients were brought to surgery with abnormal laboratory studies and clinical findings that should have resulted in cancellation of the surgery, but did not. By doing surgery under local and regional block anesthesia without the aid of an anesthesiologist, Dr. Pinhas assumed the full responsibility to proceed with the surgery but did not appropriately check the laboratory data before surgery and cancel those cases where indicated. There was created a situation in which the patients' health and welfare were in immediate danger.

4. CHARGE II.A.

DESCRIPTION

Lack of consent for procedure performed.

DISCUSSION

This charge was not sustained by the evidence. The consents for surgery were broad enough to cover the proposed procedure, and the operative reports reflected the appropriateness of the procedure performed.

5. CHARGE II.B.

DESCRIPTION

Lack of informed consent.

DISCUSSION

This charge was not sustained by the evidence. The evidence presented by Dr. Pinhas demonstrated that the patient or their conservators were able to sign an informed consent for surgery. No willful disregard of hospital bylaws or policies was shown nor was there a substantial likelihood of immediate injury or damage to the health or safety of patients.

6. CHARGE II.C.

DESCRIPTION

No intraocular lense (IOL) consent.

DISCUSSION

This charge was not sustained by the evidence. The evidence presented by Dr. Pinhas demonstrated that the IOL consents were obtained in the doctor's office and that a reasonable attempt was made to get them to the patient's chart in a timely manner. Again, Dr. Pinhas showed by a preponderance of the evidence that there was neither a willful disregard of hospital rules nor substantial likelihood of immediate injury or damage to the health or safety of patients.

7. CHARGE III.

DESCRIPTION

No assistant at surgery.

DISCUSSION

This charge was not sustained by the evidence. The evidence indicated that no assistant was present at surgery for a few cases on a single day under extenuating circumstances. Once Dr. Pinhas was told not to break this rule again, the episode was never repeated. There was no substantial likelihood of injury to patients nor did Dr. Pinhas' conduct rise to the level of willful disregard of hospital rules.

CONCLUSIONS

1. It was the opinion of the Judicial Review Committee that the summary suspension of Simon J. Pinhas, M.D. was reasonable and should be upheld because of the evidence brought in connection with Charge I.C.

2. The Committee further recommends the immediate reinstatement of Dr. Pinhas to the Medical Staff on the following special conditions to which Dr. Pinhas must agree:

(a) All pre-operative evaluations on Dr. Pinhas' surgical patients must be done prior to the patient's hospital admission and within seven (7) days of surgery, and medical problems identified in these evaluations shall be treated pre-operatively.

(b) Dr. Pinhas must have an anesthesiologist present in the operating room to monitor the patient and act as an additional physician to check and evaluate the medical condition and record of the patient.

(c) Dr. Pinhas' patients for ophthalmic surgery must have obtained a second opinion for this surgery pre-operatively from a panel of staff opthalmologists approved by the Medical Executive Committee in rotational

sequence. The second opinion must support the indications for surgery.

(d) Dr. Pinhas must in all other respects conform to hospital bylaws, and rules and regulations.

3. If Dr. Pinhas agrees to the conditions for reinstatement of medical privileges, he will be on probation for six months from the date of agreement. The Medical Executive Committee shall appoint an *ad hoc* committee to review Dr. Pinhas' record at the end of or during the probationary period to see that these conditions are satisfactorily met. The *ad hoc* committee may recommend reinstatement of the suspension, removal of the conditions, continuation of the probationary period, or set new guidelines, as it wishes, and may set reasonable rules for its own operation.

4. Although not a condition of the agreement, the Judicial Review Committee suggests to Dr. Pinhas that he decrease his surgical volume so as not to tax the hospital facilities for handling a large number of outpatient cases on a single day. The surgeries are elective and can be spread out over a large time frame with equally good results.

Respectfully submitted,

ELLIS C. BERKOWITZ, M.D.
Chairman Judicial Review
Committee

[MIDWAY HOSPITAL MEDICAL CENTER
LETTERHEAD DELETED]

July 6, 1987

Stephen Weitzman, MD
Chairman of Board of Directors
Midway Hospital Medical Center
8635 West Third Street #1170-W
Los Angeles, CA 90048

Re: Judicial Review Committee
in the matter of
Simon J. Pinhas, MD

Dear Doctor Weitzman:

The Medical Executive Committee reviewed the decision and recommendation of the Judicial Review Committee regarding Simon J. Pinhas, M.D. A copy of that decision is enclosed.

The Medical Executive Committee has unanimously voted to appeal the findings of the Judicial Review Committee regarding Charges 1.A., 1.B., 2.A., 2.B., 2.C. and 3 as well as the recommendation of the Judicial Review Committee that Dr. Pinhas be reinstated for a probationary period under certain terms and conditions. The grounds for this appeal are that the Medical Executive Committee believes that these findings and this recommendation are arbitrary and capricious. The Medical Executive Committee believes that the *decision* reached by the Judicial Review Committee that summary suspension of Dr. Pinhas was appropriate is correct, but further believes that this decision is supported by substantial evidence for each of the charges, and that the Medical

Executive Committee's initial recommendation of termination of medical staff membership is warranted in this case.

By copy of this letter for Dr. Pinhas I am notifying him of this appeal.

Very truly yours,

Arthur N. Lurvey, M.D.
Chief of Staff

Enc. (Decision)
cc. S. Pinhas, M.D.

GOVERNING BOARD OF
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

NOTICE OF APPEAL PURSUANT TO BYLAWS

COMES NOW Simon J. Pinhas, M.D., in proper, and hereby states that the report and recommendations of the Judicial Review Committee, dated June 12, 1987, was received by Simon J. Pinhas, M.D., respondent, on June 29, 1987 and pursuant to Article VIII, Section 3 hereby gives notice that, without waiving any other right(s), respondent hereby appeals the decision of the Judicial Review Committee to the Governing Board.

The determinations by the Hearing Officer and the Judicial Review Committee were contrary to the rights secured by and granted to Simon J. Pinhas, M.D. by the Bylaws, the laws and Constitutions of the State of California and of the United States, were not supported by substantial evidence and were arbitrary and capricious.

DATED: July 7, 1987

By: (signature)
Simon J. Pinhas, M.D.

EXHIBIT "R"

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[CAPTION OMITTED IN PRINTING.]

NOTICE OF MOTIONS AND MOTIONS TO DISMISS COMPLAINT AND FOR SANCTIONS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[F.R.Civ.P. Rules 11, 12(b)(1), and 12(b)(6)]

Date: September 21, 1987
Time: 10:00 a.m., Courtroom: 255

To Plaintiff, SIMON J. PINHAS, M.D., and to his attorney of record, Lawrence Silver, and co-counsel Maxwell Blecher:

PLEASE TAKE NOTICE that Defendants SUMMIT HEALTH, LTD., MIDWAY HOSPITAL MEDICAL CENTER, THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER, MITCHELL FELDMAN, AUGUST READER, ARTHUR N. LURVEY, RICHARD E. POSELL, JONATHAN I. MACY, JAMES J. SALZ, GILBERT PERLMAN, PEGGY FARBER, MARK KADZIELSKI and WEISSBURG AND ARONSON, INC., hereby move this Court for an order dismissing plaintiff's complaint for damages and injunctive relief pursuant to Federal Rule of Civil Procedure 12(b)(1), and 12(b)(6). Defendants also move this Court for sanctions pursuant to Federal Rule of Civil Procedure 11, against counsel for plaintiff. These motions have been set for hearing on September 21, 1987 at 10:00 o'clock a.m. in Courtroom 255 of the United States District Court located at 312 North Spring Street, Los Angeles, California.

Defendants bring these motions on the grounds that plaintiff failed to plead a federal question sufficient to invoke federal subject matter jurisdiction (F.R.Civ.P. 12(b)(1)); failed to state a claim upon which relief can be granted (F.R.Civ.P. 12(b)(6)); and plaintiff's counsel failed to conduct a reasonable inquiry both as to the relevant facts and law prior to bringing the instant action, and prior to amending the first complaint.

These motions will be based upon these moving papers, including the attached memorandum of points and authorities, the Court's file in this action, and upon such

oral argument and documentary evidence as may be presented at the time of the hearing.

Dated: August 4, 1987

WEISSBURG AND ARONSON, INC.
ROBERT J. GERST
J. MARK WAXMAN
MARK A. KADZIELSKI

BY: MARK A. KADZIELSKI
MARK A. KADZIELSKI
Attorneys for Defendants

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I.

INTRODUCTION.

On Tuesday, May 26, 1987 this Court denied plaintiff's ex parte application for a temporary restraining order. In its order, this Court stated, "the Court seriously questions whether it has jurisdiction over plaintiff's Complaint." (A copy of the Court's order is attached as Exhibit "A"). After Defendants moved to dismiss plaintiff's complaint in its entirety, plaintiff represented that he would amend his complaint to plead additional facts showing state action. Not only has plaintiff failed to plead any further facts showing state action, but plaintiff also has elected to bring an antitrust cause of action that is frivolous and inconsistent with his previous factual and legal contentions. Defendants now move to dismiss plaintiff's complaint because: (1) plaintiff's jurisdictional claims are insufficient (2) the civil rights claims which were previously deficient have not been amended and (3) its antitrust claim is inadequately pled and is barred by the state action immunity doctrine.

II.

STATEMENT OF FACTS.

On April 13, 1987, the Medical Executive Committee of defendant Midway Hospital summarily suspended plaintiff's medical staff privileges as a result of, among other things, plaintiff's failure to document adequately patients' medical records, plaintiff's performance of inappropriate surgical procedures, and plaintiff's performance of surgical procedures without appropriate patient consents or required surgical assistants. (Complaint, Exhibits B and F).

Pursuant to the Midway medical staff bylaws, plaintiff appealed this suspension and the subsequent recommendation of termination of plaintiff's membership in the medical staff. On May 26, May 27, June 1, June 2, and June 9, the medical staff's Judicial Review Committee conducted a hearing that afforded plaintiff a full and fair opportunity to present any facts, witnesses, or arguments in support of his case. The Judicial Review Committee rendered a decision on June 8, 1987. Both plaintiff and the medical executive committee of the hospital have appealed the decision to the Board of Directors of defendant hospital. Ultimately, plaintiff is entitled to seek judicial review of the entire administrative hearing process in state court, pursuant to California Code of Civil Procedure Section 1094.5(d).

III.

ARGUMENT.

A. STANDARDS FOR DISMISSAL FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER.

A motion to dismiss for lack of jurisdiction over the subject matter may be presented before the responsive pleading. F.R.Civ.P. Rule 12(b)(1). Dismissal is the appropriate disposition if subject matter jurisdiction is absent. *Demarest v. United States,* 718 F.2d 964, 965 (9th Cir. 1983), *cert. denied,* 466 U.S. 950, 104 S.Ct. 2150 (1984).

In a challenge to subject matter jurisdiction, "*'[n]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.'*"

Thornhill Publishing v. General Telephone and Electronics, 594 F.2d 730, 733 (9th Cir. 1979) (emphasis added).

"A federal question is jurisdictionally insubstantial if it is patently without merit, or so insubstantial, improbable, or foreclosed by Supreme Court precedent as not to involve a federal controversy." *Demarest,* 718 F.2d at 966, *citing, Duke Power Company v. Carolina Environmental Studies Group,* 438 U.S. 59, 70-71, 98 S.Ct. 2620, 2628-2629, 57 L.Ed.2d 595 (1978).

If a jurisdictional motion involves factual issues that also involve the merits, "the trial court should employ the standard applicable to a motion for summary judgment, as a resolution of the jurisdictional fact is akin to a decision on the merits." *Augustine v. United States,* 704 F.2d at 1074, 1077 (9th Cir. 1983). "Therefore, the moving party should prevail only if the material jurisdictional facts are not in dispute and if the moving party is entitled to prevail as a matter of law." *Id.*

B. PLAINTIFF'S CLAIMS FOR CIVIL RIGHTS DEPRIVATION ARE PATENTLY UNSUPPORTED BY JURISDICTIONAL FACTS.

Plaintiff's *amended* complaint contains *no additional facts* to support his claim of state action. Plaintiff still predicates subject matter jurisdiction for his civil rights claims on the mere existence of California's statutory scheme governing the medical peer review process. (Complaint, ¶¶ 80, 81, 89, 111). Plaintiff still argues that given the existence of the California peer review scheme, defendants are "estopped" from denying that they act under color of state law. *Id.*

Plaintiff previously relied upon the recent decision in *Patrick v. Burget,* 800 F.2d 1498 (9th Cir. 1986),[2] which held that the Oregon statutes governing peer review proceedings within a private hospital sufficiently revealed "state action" for the purposes of immunity from civil liability under the federal antitrust laws. (Plaintiff's Mem. Pnts. & Aths., TRO, pages 5-7). Plaintiff argued that the finding of "state action" in *Patrick* controls the state action issue in the present case. (*Id.*, at page 7, lines 13-16).

Since plaintiff clearly relies exclusively upon the existence of the California statutory scheme, the jurisdictional facts are not in dispute. Moreover, plaintiff's jurisdictional theory does not involve factual issues that go to the merits of the present case, and the Court may properly rule on this jurisdictional issue as a matter of law.

1. Plaintiff's Civil Rights Claims Are Foreclosed

Plaintiff argues that the mere existence of state regulation is sufficient to demonstrate state action under 42 U.S.C. Sections 1983 and 1985(3). The Supreme Court has concluded precisely the opposite.

In *Jackson v. Metropolitan Edison Company,* 419 U.S. 345, 350, (1974), the Supreme Court stated, *"the mere fact that a business is subject to state regulation does not by itself convert its action to that of the state for the purposes of the Fourteenth Amendment".* (Emphasis added). In *Jackson,* a customer brought suit under Section 1983 against a privately owned and operated utility company for discon-

[2]An appeal of this case is currently pending before the United States Supreme Court. 107 S.Ct. 1345, 94 L.Ed.2d 516, 55 U.S.L.W. 3586 (March 2, 1987).

necting her electrical service without affording her notice and an opportunity for a hearing. Although the utility company was subject to extensive state regulation, the Supreme Court concluded that the private actions of the utility company were not those of the state.

The Court reiterated that for state action to exist, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351.

If the conduct of a private utility does not constitute state action by virtue of the extensive regulation, then logically defendants' conduct in the present case cannot possibly constitute state action.

2. Ninth Circuit Precedents Make Plaintiff's Claims Improbable.

A trilogy of Ninth Circuit cases makes plaintiff's claims patently insubstantial. In *Aasum v. Good Samaritan Hospital*, 542 F.2d 792 (9th Cir. 1976), the court found *no state action* where a private hospital excluded a chiropractor from its facilities, even though the hospital received federal funds under the Hill-Burton Act, received both state and federal tax advantages as a non-profit corporation, and was subject to mandatory inspection and licensing regulations of the State of Oregon. *See also, Crowder v. Conlan*, 740 F.2d 447 (6th Cir. 1984). The *Aasum* court stated, "[i]t is only when the asserted discriminatory conduct is of constitutional dimension and results from action under color of state law, that the *jurisdiction* of the district courts attaches, ..." *Aasum v. Good Samaritan Hospital*, 542 F.2d 792, 794 (9th Cir. 1976) (emphasis added).

Second, in a due process action brought by a physician against a private hospital, the court addressed the question "whether a private hospital's receipt of federal funds . . . coupled with federal and state tax exemptions, constitutes *state action* sufficient to confer jurisdiction on this court under 42 U.S.C. § 1983." *Ascherman v. Presbyterian Hospital of Pacific Medical Center, Inc.*, 507 F.2d 1103, 1104 (9th Cir. 1974) (original emphasis). The court found *no state action*.

Finally, in *Watkins v. Mercy Medical Center*, 520 F.2d 894 (9th Cir. 1975), the court found *no state action* where a private hospital did not renew a physician's medical staff privileges even though the private hospital received federal funds under the Hill-Burton Act. The court stated, "[t]his circuit has repeatedly held that for state involvement with a private entity to confer jurisdiction under 42 U.S.C. § 1983 the involvement must be with a specific activity of which a party complains." 520 F.2d at 896. Under these three cases, plaintiff's state regulation/state action jurisdictional theory is insubstantial and improbable if not entirely frivolous.

3. Plaintiff States No Claim Under Sections 1983 and 1985(3).

Should this Court determine that plaintiff properly has pleaded a federal question sufficient to invoke subject matter jurisdiction, defendants respectfully request this Court to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants move to dismiss the complaint for failure to state a claim upon which relief can be granted as an alternative to dismissal for lack of subject matter jurisdiction.

a. No Claim Under Section 1983.

To maintain an action under 42 U.S.C. Section 1983, a plaintiff must establish: (1) that defendant was acting 'under color of state law' at the time of the acts complained of; and (2) that defendant deprived plaintiff of [a] right, privilege, or immunity secured by the Constitution or laws of the United States." *Freier v. New York Life Insurance Company,* 679 F.2d 780, 783 (9th Cir. 1982).

In the present case, Defendants are private entities, and their private conduct "however discriminatory or wrongful" is not proscribed. *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 172, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), *quoting Shelley v. Kraemer,* 334 U.S. 1, 13, 63 S.Ct. 836, 92 L.Ed. 1161 (1948). In order for private conduct to be considered state action, the conduct must be "fairly attributable to the state." *Lugar v. Edmondson Oil Company,* 457 U.S. 922, 937, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982). This requirement is not satisfied unless "the party charged with the deprivation . . . may fairly be said to be a state actor." *Id.* Moreover, the Court of Appeals for the Ninth Circuit has repeatedly held that private conduct may constitute state action only if the state is "involved in the specific activity complained of, . . ." (*Taylor v. St. Vincent's Hospital,* 523 F.2d 75, 77 (9th Cir. 1975)), and "the involvement must be significant." *Watkins, supra,* 520 F.2d at 896.

Plaintiff still predicates his jurisdictional claims exclusively upon the existence of state statutes and regulations governing peer review proceedings. Within the specific peer review proceedings at issue in the present case, plaintiff has made no allegations showing that the state has either intruded or participated or "so far insinuated itself into a position of interdependence with [a private entity] that it must be recognized as a joint participant in

the challenged activity . . . ." *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856, 862, 6 L.Ed.2d 45 (1961).

Moreover, in light of the Supreme Court decision in *Jackson* as well as the decisions of the Ninth Circuit Court of Appeals in *Aasum, Ascherman,* and *Watkins,* plaintiff's case is no better than it was before he amended his complaint.

b. No Claim Under Section 1985(3).

In order to maintain an action under 42 U.S.C. Section 1985(3), plaintiff must establish (1) that a conspiracy existed; (2) that the conspiracy's purpose was to deprive a person of equal protection of the law; (3) that the conspiracy was motivated by some racial or class based discriminatory animus; and (4) that the person injured was a member of the class of persons discriminated against. *Canlis v. San Joaquin Sheriff's Posse Comitatus,* 641 F.2d 711 (9th Cir. 1981). Moreover, if the claimed deprivation involved the First or the Fourteenth Amendments plaintiff also must establish that the deprivation involved state action. *United Brotherhood of Carpenters and Joiners of America v. Scott,* 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983) (plurality opinion).

For the reasons previously discussed, plaintiff cannot show state action under either Section 1983 or Section 1985(3). Moreover, to withstand a Rule 12(b)(6) motion to dismiss, plaintiff's claim must contain "more than bare allegations of conspiracy." *Franco v. County of Marin,* 579 F.Supp. 1032, (N.D.Cal. 1984), *aff'd,* 762 F.2d 1017 (9th Cir. 1985). The complaint also lacks specific allegations of class-based animus. *Id.* Since plaintiff's complaint is devoid of specific factual allegations to support a Section 1985(3) claim, the complaint is devoid of merit and

should be dismissed. *Uston v. Airport Casino, Inc.*, 564 F.2d 1216, 1217 (9th Cir. 1977).

4. Substantial State Interests Justify Federal Abstention.

The present action raises important and sensitive issues of state health care policy. A federal district court may abstain from the exercise of jurisdiction in cases that present important questions of state policy transcending the result in the case at bar. *McIntyre v. McIntyre*, 771 F.2d 1316, 1319 (9th Cir. 1985), *citing, Burford v. Sun Oil Company*, 319 U.S. 315, 63 S.Ct. 1088, 87 L.Ed. 1424 (1943). The *Burford* doctrine calls for federal court abstention in cases involving important state policies and their administration by agencies existing for that purpose. As summarized by the Supreme Court, for abstention under the *Burford* doctrine, "it is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814, 96 S.Ct. 1246, 1245, 47 L.Ed.2d 483 (1976). Dismissal is the proper course rather than retention of jurisdiction. *Burford*, 319 U.S. at 334.

Moreover, the recent decision by the United States Supreme Court in *Pennzoil Company v. Texaco, Inc.*, 107 S.Ct. 1519 (April 6, 1987), also supports abstention under the doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971). As stated by the Supreme Court in *Pennzoil*,

> This concern mandates application of *Younger* abstention not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State's interests in the proceeding

> are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government. (Citation) 107 S.Ct. at 1526.

The Court continued and stated, "[a]nother important reason for abstention is to avoid unwarranted determination of federal constitutional questions." *Id.*

The present case involves interpretation of state statutes, regulations and rules that should be left to state administrative tribunals and civil proceedings to avoid the possibility of unwarranted intrusion into matters of state policy. *Oler v. Trustees of California State University and Colleges*, 80 F.R.D. 319, 320 (N.D.Cal. 1978). The state's interests in civil proceedings governing the maintenance and regulation of quality in the delivery of health care services by medical facilities apply equally well to administrative proceedings pending before defendant hospital. In the present case, the State of California has several interests in the pending administrative proceedings that justify abstention under the *Burford* if not the *Younger* abstention doctrines.

First, the state has an interest in affording discretion to administrative expertise in determining whether an applicant not only is qualified to practice a profession in the first instance, but also is qualified to assume responsibilities involved in a grant of hospital privileges. *Unterthiner v. Desert Hospital District.*, 33 Cal.3d 285, 298 (1983). Second, the state has an interest in ensuring procedural fairness in administrative proceedings involving clinical privileges. *Anton v. San Antonio Community Hospital*, 19 Cal.3d 815, 829 (1977). Third, the state has an interest in ensuring that judicial review is available and proceeds in an orderly fashion. *Westlake Community Hospital v. Superior Court*, 17 Cal.3d 465 (1976). Finally,

the state has an interest in encouraging open and frank discussions in peer review proceedings. *Ascherman v. San Francisco Medical Society*, 39 Cal.App.3d 623 (1974).

By bringing this action in federal court, plaintiff has attempted to bypass the state administrative and judicial systems, to secure a civil damages action that would not be presently available under state law. Moreover, plaintiff is attempting through federal constitutional principles to usurp state control over peer review proceedings and regulation of medical conduct. Under either the *Burford* or the *Younger* abstention doctrines, in the interest of federalism and comity between federal and state courts, plaintiff's complaint should be dismissed.

C. PLAINTIFF'S ANTITRUST CLAIM IS BOTH JURISDICTIONALLY BARRED AND FACTUALLY INSUFFICIENT.

Plaintiff first initiated this action by asserting that the antitrust state action immunity doctrine applies to the California peer review process under *Patrick v. Burget, supra.* Now plaintiff has amended his complaint to set forth a claim for relief under the Sherman Antitrust Act, 15 U.S.C. § 1.

Moving defendants contend: plaintiff's antitrust claim for relief should be barred by the antitrust state action immunity doctrine and by the doctrine of judicial estoppel; plaintiff failed to plead any facts showing interstate commerce sufficient to support jurisdiction for a valid antitrust claim; and furthermore, plaintiff has not pleaded the elements necessary to establish a violation under Section 1 of the Sherman Act: "(1) an agreement or conspiracy; (2) resulting in unreasonable restraint of trade and (3) causing 'antitrust injury.'" *Richards v. Canine Eye Registration Foundation*, 783 F.2d 1329, 1332

(9th Cir. 1986). Therefore, defendants respectfully request this Court to dismiss plaintiff's antitrust claim, or in the alternative, to grant defendants summary judgment.

1. The Antitrust State Action Immunity Doctrine Bars Plaintiff's Claim For Antitrust Relief.

In *Patrick v. Burget*, the Court of Appeals for the Ninth Circuit held that peer review actions taken pursuant to an express Oregon statutory scheme were actions of the state and therefore immune from antitrust liability. 800 F.2d, at 1500. In reliance upon this authority, plaintiff engaged in a comprehensive analysis of the Oregon and California statutory schemes, and asserted that, "the California scheme is not distinguishable . . . ." (Plaintiff's Mem. Pnts. & Auths., page 5, line 28). Moving defendants agree.

Plaintiff has already taken the position that the California peer review scheme is indistinguishable from the Oregon peer review scheme. Now plaintiff necessarily must argue that the antitrust state action immunity doctrine does not apply, a contention diametrically opposed to his previous position. Having previously elected to pursue specific legal and factual contentions, plaintiff should be barred by judicial estoppel from reversing those contentions.

As stated by the United States District Court for the Central District of California, "'[j]udicial estoppel' is a well-established rule that a party may not assert contrary positions in the same or related proceedings. It is, more properly, a rule which estops a party from 'playing fast and loose with the courts.' (citations omitted)." *Matek v. Murat*, 638 F.2d 775, 783 (C.D.Cal. 1986), *citing, Selected*

Risks Insurance Company v. Cobelinski, 421 F.Supp. 431, 434 (E.D. Pa., 1976).

The court in *Patrick* further stated that, "once we have determined that the state has acted to replace competition with regulation in a given market, out of respect for the sovereignty of the state, federal antitrust laws simply are displaced." 800 F.2d at 1507. Thus, the antitrust state action immunity doctrine is a bar to jurisdiction under the antitrust laws. As stated by the Court of Appeals for the Seventh Circuit, "... the state action doctrine provides an *exemption* from the federal antitrust laws and, if applicable, allows for dismissal of the Complaint." *Marrese v. InterQual, Inc.*, 748 F.2d 373, 384 (7th Cir. 1984). Moving defendants therefore contend that plaintiff's antitrust claim for relief should be dismissed as barred by the antitrust state action immunity doctrine.

2. Plaintiff Has Failed To Plead Adequately Any Effect on Interstate Commerce.

The Sherman Act prohibits contracts, combinations, conspiracies in restraint of trade or commerce "among the several states." 15 U.S.C. § 1. Jurisdiction may not be invoked under the Sherman Act unless the relevant aspect of interstate commerce is identified. "It is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship of some unspecified aspect of interstate commerce." *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 242, 100 S.Ct. 502, 509 (1980). To establish jurisdiction, a plaintiff must allege the critical relationship in the pleadings. *Id.*

The jurisdictional requirement may be satisfied by either of two alternative tests: (1) the "in commerce" test, which involves a showing that the activities are

within the flow of interstate commerce, and (2) the "effect on commerce" test, which involves a showing that the activities, even though themselves wholly intrastate, nevertheless substantially affect interstate commerce. *McLain*, 444 U.S. at 242, *citing Hospital Building Company v. Trustees of Rex Hospital*, 425 U.S. 738, 743, 96 S.Ct. 1848, 1851 (1976). *See also, Carey v. Daniel Freeman Memorial Hospital et al;* 1984-1 Trader Cases (CCH) ¶ 65, 831 (C.D. Cal. November 22, 1983)

The "effect on commerce" test consists of a two-part analysis. "First, a relevant aspect of interstate commerce must be identified [and] second, the defendants' activities must be shown 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." *Palmer v. The Roosevelt Lake Log Owners Association*, 651 F.2d 1289, 1891 (9th Cir. 1981), *citing, McLain* 444 U.S. at 246. *McLain* expressly states that an interrelationship with interstate commerce will not be presumed by a local activity. Rather, "a plaintiff must allege a critical relationship within the pleadings...." *McLain*, 444 U.S. at 242.

Plaintiff has alleged only in conclusory terms that defendants "are engaged in interstate commerce." Plaintiff's conclusory allegations are insufficient to meet the standards under *McLain*. Plaintiff's conclusory allegations fail to identify any relevant line of interstate commerce, and further fail to show any substantial effect on interstate commerce. Therefore, plaintiff's claim should be dismissed.

3. Plaintiff Has Not Alleged Any Facts Sufficient To Constitute a Conspiracy.

Section 1 of the Sherman Act prohibits unreasonable restraints of trade effected by a conspiracy between sepa-

rate entities. "It does not reach conduct that is 'wholly unilateral' ". *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752, 767-768, 104 S.Ct. 2731 (1984). The Court in *Copperweld* also stated, "officers or employees of the same firm do not provide the plurality of actors imperative for a Section 1 conspiracy." *Id.* at 769. Finally, the Court stated "the coordinated activity of the parent and its wholly owned subsidiary must be viewed as a single enterprise for purposes of Section 1 of the Sherman Act." *Id.* at 771. The Ninth Circuit Court of Appeals concurs, "two or more individual officers, directors or agents within a corporation, acting on behalf of that corporation, are considered incapable of conspiring with each other or with their corporation, for Section 1 purposes." *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455 fn. 7 (9th Cir. 1979).

In the present case, the defendants against whom plaintiff brings an antitrust claim must be viewed as a single entity. Plaintiff alleges that "Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz, and Dr. Perlman, entered into a combination and conspiracy to retaliate against [plaintiff] and to preclude him from continued competition in the marketplace, ..." (Complaint, ¶ 124, p. 42, 11s. 14-18). Plaintiff also alleges that defendants have "effectuated a boycott" of plaintiff by filing an improper disciplinary report pursuant to California Business and Professions Code Section 805. (Complaint, ¶ 124, p. 42-43, 11s. 19-6.)

Plaintiff has admitted that Summit Health Ltd. is the parent of Midway Hospital, that Mitchell Feldman is regional vice-president of Summit Health, and that Arthur Lurvey, M.D., is Chief of Staff of Midway Hospital. (Complaint, ¶¶ 6, 9, and 11, respectively). Plaintiff further alleges that Mitchell Feldman and Dr. Lurvey initiated the summary suspension of plaintiff's clinical privileges. (Complaint, ¶ 29, p. 10, 11s 9-16). Since Dr. Lurvey and Mitchell Feldman were acting in their official capacities in the institution of peer review proceedings, they were legally incapable of conspiring with defendant Summit Health, Midway Hospital, or the Medical Staff. Plaintiff does not allege any other facts showing that Dr. Reader, Dr. Macy, Dr. Salz, or Dr. Perlman had anything whatsoever to do with initiation of the peer review proceedings. Indeed, plaintiff does not allege so much as a conversation among them.

Plaintiff further alleges that the alleged conspiracy "enlisted the assistance and received the assistance of Mr. Posell, Mr. Kadzielski, and [Weissburg and Aronson] to create unjustified charges, ..." (Complaint, ¶ 124, p. 42, 11s. 25-27). In general, plaintiff alleges that the antitrust defendants "engaged in conduct to deprive plaintiff Dr. Pinhas of a fair hearing." (Complaint, ¶ 53, p. 17, 11s. 7-8).

Mr. Kadzielski and Weissburg and Aronson are legal counsel for moving defendants, and they have not acted in any capacity other than as agents for such defendants. Thus, plaintiff has further failed as a matter of law to allege any conspiracy cognizable by the Sherman Act. The institution of peer review proceedings at defendant hospital must be viewed as the action of a single entity. To the extent that a concerted refusal to deal or a group boycott also requires a plurality of actors, plaintiff's allegations of a group boycott are also insufficient and therefore should be dismissed.

4. Plaintiff Has Failed To Plead Any Facts Showing An Unreasonable Restraint of Trade.

Plaintiff has instituted the present action in response to defendant hospital's summary suspension of his clinical privileges. Plaintiff apparently complains of two genres of harm: potential injury to his personal practice, and injury from unfair procedures in the administrative hearings. (Complaint, ¶¶ 122, 124, 126.)

Nowhere does plaintiff allege an adverse effect on competition distinguished or distinguishable from the effects on plaintiff's own medical practice. "Absent injury to competition, injury to plaintiff as a competitor will not satisfy the pleading requirement of Section 1." *Falstaff Brewing Company v. Stroh Brewery Company,* 628 F.Supp. 822, 827 (N.D.Cal. 1986), *citing Brunswik Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488 (1977). "The antitrust laws were enacted for the protection of competition not competitors." *Id.* Thus, the elimination of a single competitor, such as plaintiff, standing alone, will not constitute injury to competition compensable under the Sherman Act. *Falstaff Brewing Co.,* 628 F.Supp. at 828; *Gough v. Rossmoor Corp.,* 585 F.2d 381, 386 (9th Cir. 1978).

If there are many competitors in the market, an injury to one competitor will not have an effect on consumers or anyone else beside the competitor in question. *Id.* Plaintiff has made no allegations that defendants enjoy either market power or control access to an unique element essential for competition. In the present case, plaintiff is only one competitor among many in the relevant market for ophthalmological services. Therefore, plaintiff has not pleaded, and cannot advance sufficient evidence of an unreasonable restraint of trade or an adverse effect on competition that is distinct from his individual business.

5. Plaintiff Has Failed To Plead Any Facts Showing Antitrust Injury.

Plaintiff also complains about procedural fairness, alleging that Lacey Court Reporting Service, Weissburg and Aronson, Mr. Kadzielski, and other defendants have conspired to deny plaintiff a fair hearing, and a transcript of that hearing. Even if plaintiff's allegations of procedural unfairness were true, any injury to plaintiff arising therefrom would not be injury cognizable under the Sherman Act. Plaintiff's due process rights, or his rights to fair procedure, his rights to a timely transcript, and his rights to unintimidated witnesses, are not rights either in nature or in scope required by or protected by antitrust laws. As stated by the United States Supreme Court in *Northwest Wholesale Stationers v. Pacific Stationery and Printing Co.,* 105 S.Ct. 2613, 2619 (1985), "In any event, the absence of procedural safeguards can in no sense determine the antitrust analysis."

D. PLAINTIFF'S CLAIM FOR DECLARATORY RELIEF DOES NOT PRESENT A CASE OR CONTROVERSY AGAINST MOVING DEFENDANTS.

Plaintiff has amended his complaint to include a new claim for declaratory relief against certain defendants including the California State Board of Medical Quality Assurance ("BMQA"). Plaintiff contends that these defendants are enforcing and participating in the enforcement of unconstitutional medical quality assurance statutes, both state and federal, that require hospitals to file reports of specified disciplinary actions taken with respect to a physician's clinical privileges. Thus, plaintiff seeks a declaratory judgment that Sections 805 and 805.5 of the California Business and Professions Code, and Sections 423 *et seq.* of the Health Care Quality Improve-

ment Act of 1986 (42 U.S.C. § 11133 *et seq.*), are unconstitutional.

Plaintiff's claim for declaratory relief does not present a case or controversy against moving defendants. As shown above, subject matter jurisdiction does not exist, and even if jurisdiction did exist declaratory relief would be inappropriate as against the moving defendants. Finally, the pendency of state administrative proceedings justifies abstention by this Court.

1. A Claim for Declaratory Relief Cannot Extend Jurisdiction.

Declaratory relief is a procedural device only, and "does not confer an independent basis of jurisdiction on the federal court." *Alton Box Board Company v. Esprit De Corps.*, 682 F.2d 1267 (9th Cir. 1982). Thus, "the use of the declaratory judgment statute does not confer jurisdiction by itself if jurisdiction would not exist on the face of a well-pleaded complaint without the use of 28 U.S.C. § 2201." *Janakes v. United States Postal Service*, 768 F.2d 1091, 1093 (9th Cir. 1985). The requirement of a "case or controversy" still holds, and "the question in each case is whether the facts alleged, under all of the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Company v. Pacific Coal and Oil Company*, 312 U.S. 270, 273, 61 S.Ct. 510 (1965); *State of California v. Oroville-Wyandotte Irrigation District*, 409 F.2d 532, 535 (9th Cir. 1969).

Under these standards, plaintiff has not pleaded facts sufficient to demonstrate any substantial controversy between plaintiff and moving defendants on the issue of constitutionality of the disciplinary reporting statutes.

First, contrary to plaintiff's convenient allegations that "Defendants contend and seek a declaration to the contrary," moving defendants do not have an interest in controverting plaintiff's challenge to state and federal disciplinary reporting statutes. Defendants' involvement is mandatory under the statutes, purely ministerial and thus peripheral to the allegations underlying plaintiff's claim for declaratory relief. Moreover, plaintiff can neither allege nor adduce eivdence showing that defendants would attempt to enforce the challenged statutes if this Court were to declare them unconstitutional. Therefore, the claim should be dismissed against them. *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1361, (1977), *cert. granted* in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 99 S.Ct. 2843, 436 U.S. 943, *affirmed in part, reversed in part*, 99 S.Ct. 1171, 440 U.S. 391, *on remand*, 474 F.Supp. 901.[1]

Second, plaintiff's claim for declaratory relief lacks sufficient immediacy to warrant the issuance of a declaratory judgment, particularly in light of the administrative and judicial procedures available to plaintiff to challenge the appropriateness of the hospital disciplinary actions, which if properly invoked and proven, may allow plaintiff to reverse and expunge his professional record both at the hospital and with the BMQA. For these reasons, moving defendants contend that plaintiff has not demonstrated a case or controversy sufficient to invoke subject matter jurisdiction of this Court.

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[1]In *Jacobson*, the district court originally dismissed claims for monetary and declaratory relief against certain counties that merely enforced an ordinance that had been passed by the Tahoe Regional Planning Agency that allegedly infringed the constitutional rights of the plaintiffs in that case. Defendants' position is analogous to the position of defendant counties in *Jacobson*.

2. Declaratory Relief is Inappropriate Against Moving Defendants.

Should this Court find that plaintiff has adequately demonstrated subject matter jurisdiction for declaratory relief, defendants further contend that plaintiff's claim should be dismissed because any declaratory judgment would be inappropriate.

Whether to entertain the claim and grant declaratory relief is a matter within the discretion of the court. *State of California v. Oroville-Wyandotte Irrigation District*, 409 F.2d at 535. However, declaratory relief is only appropriate "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding (Citation)." *Guerra v. Sutton*, 783 F.2d 1371, 1376 (9th Cir. 1986).

In the present case, a judgment declaring federal and state disciplinary reporting statutes unconstitutional would not settle or clarify any legal relations between plaintiff and moving defendants. Nor would such a judgment terminate the controversy giving rise to this proceeding. Plaintiff has raised a new issue entirely collateral to the pending peer review proceedings.

Moreover, a judgment declaring federal and state statutes unconstitutional would also be inappropriate to the extent that the contemplated declaration would be *res judicata*, and would frustrate the BMQA's investigative power to hear evidence and decide plaintiff's case for itself.

3. Pendency of Administrative Proceedings Justifies Federal Abstention.

Should this Court find that plaintiff has properly invoked subject matter jurisdiction for declaratory relief, moving defendants further contend that this Court should abstain from the exercise of jurisdiction to render a declaratory judgment because the administrative proceedings at defendant hospital are still pending.

The United States Supreme Court has emphasized that the declaratory judgment procedure should not be used to preempt or prejudge issues that are committed for initial decision to an administrative body. *Public Service Commission v. Wycoff Company*, 344 U.S. 237, 246, 73 S.Ct. 236, 97 L.Ed. 291 (1952); *State of California v. Oroville-Wyandotte Irrigation District*, 409 F.2d at 535-536. The Supreme Court was even more emphatic with regard to the use of the declaratory judgment procedure for proceedings pending before a state administrative agency. The Court stated,

> an anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata*, so that the [agency] cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the [agency] before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

Public Service Commission, 344 U.S. at 247. Thus, it is inappropriate for a court to intervene when a case is properly before an administrative agency, *State of California v. Oroville-Wyandotte* 409 F.2d at 536, a principle that not only applies to proceedings that potentially may be

instituted by the BMQA, but also should apply to the proceedings pending before the hospital administrative board.

Thus, moving defendants contend that even if subject matter jurisdiction exists, the pendency of and potential for state administrative proceedings justifies federal abstention from the exercise of jurisdiction to render a judgment declaring federal and state disciplinary reporting statutes to be unconstitutional.

E. SANCTIONS AGAINST PLAINTIFF'S COUNSEL ARE WARRANTED PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 11.

Federal Rule of Civil Procedure 11 provides in relevant part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

The certificate mandated under Rule 11 addresses two separate problems: the problem of frivolous filings and the problem of misusing judicial procedure. In the present case, moving defendants contend that sanctions, in the form of attorneys fees reasonably incurred in bringing the second motion to dismiss, should be assessed against plaintiff's counsel not only for frivolous filings, but also for interposing the amended complaint for an improper purpose.

1. Plaintiff's Amended Complaint Is Without Factual Foundation And Is Legally Unreasonable.

"Rule 11 sanctions shall be assessed if the paper filed in district court and signed by an attorney or an unrepresented party is frivolous, legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith." *Zaldivar v. The City of Los Angeles,* 780 F.2d 823, 831 (9th Cir. 1986), *cert. denied,* 106 S.Ct. 2919, rehearing denied, 107 S.Ct. 12 (1986). The subjective intent of the pleader is not controlling. The standard is objective reasonableness, as compared to a competent attorney admitted to practice before the district court. *Zaldivar,* 780 F.2d at 830. In the present case, moving defendants contend that plaintiff's amendment is frivolous, legally unreasonable, and without factual foundation on the following three grounds.

First, plaintiff's initial argument that the antitrust state action immunity doctrine established in *Patrick v. Burget* necessarily required a finding of state action for the purposes of a civil rights suit was legally unreasonable. "A good faith belief in the merit of a legal argument is an objective condition which a competent attorney attains only after 'reasonable inquiry' ". *Zaldivar,* 780 F.2d at 831. Under the circumstances of this case, plaintiff's failure to undertake a reasonable inquiry is clear from his failure to find, to consider, and to bring to the Court's attention the decision of the Court of Appeals for the Seventh Circuit in *Ezpeleta v. Sisters of Mercy Health Corporation,* 800 F.2d 119 (7th Cir. 1986), which specifically rejected plaintiff's purported legal argument. Not only did the decision in *Ezpeleta* directly dismiss plaintiff's argument, but both common sense and legal sense suggest that antitrust doctrine is not relevant in civil rights actions.

Second, notwithstanding plaintiff's representation that the first amended complaint would make "additional allegations to support the existence of state action in connection with this matter" (Plaintiff's Mem. Pnts. Aths. in Opposition, pp. 1-2), plaintiff has not changed any allegations whatsoever with respect to the factual foundation for state action. Plaintiff continues to assert that defendants are legally "estopped" from arguing that their conduct is not state action. Plaintiff's failure not only to allege additional facts indicating state action, but also to amend as represented, clearly indicates that plaintiff's civil rights claim is without factual foundation, and is legally unreasonable.

Third, plaintiff's addition of an antitrust claim lacks both factual and legal foundation. Plaintiff's complaint is utterly devoid of facts alleging or demonstrating the jurisdictional prerequisites of antitrust injury, a substantial effect on interstate commerce, and a legally cognizable conspiracy. Moreover, plaintiff's antitrust claim is diametrically opposed to his previous position regarding the antitrust state action immunity doctrine in *Patrick v. Burget,* and is irremediably inconsistent with plaintiff's essential allegations that the summary suspension took place in peer review proceedings. Thus, plaintiff's counsel evidently has not undertaken a reasonable inquiry into either the factual or legal foundations for an antitrust claim, an inquiry plaintiff's counsel is obligated to undertake *before filing his complaint.*

2. Plaintiff's Counsel Has Interposed The Amended Complaint For Improper Purposes.

Rule 11 also mandates sanctions when a pleading or paper is filed "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase

in the cost of litigation." In the present case, plaintiff's first amended complaint has been interposed not only for the purpose of harassment and needless increase in the cost of litigation, but also to secure a federal forum for a claim otherwise cognizable only in state courts if at all. Four factors demonstrate that plaintiff's first amended complaint has been filed for improper purposes.

First, plaintiff had absolutely no basis in fact or in law to join defense counsel, Weissburg and Aronson, Inc., and Mark Kadzielski, as defendants, and his so doing must have been intended solely to harass defense counsel. Since defense counsel are also involved in the pending administrative appellate proceedings before the Midway Hospital Board in this case, the effects of such harassment are magnified.

Second, plaintiff's first amended complaint leaves entirely unchanged the factual allegations in support of plaintiff's civil rights claims. As stated above, plaintiff represented that he would amend to make additional factual allegations in support of state action. Plaintiff has not done so, and his failure must be construed as an admission that no such factual foundation exists. Despite the absence of factual foundation, plaintiff elected to preserve these civil rights claims, a choice that unnecessarily increases the cost of litigation, and that serves only to harass. Moreover, this Court may deny plaintiff any further right to amend on these claims, because "where the party seeking amendment knows or should know of the facts underlying the amendment when the original complaint is filed, the motion to amend may be denied." *Sierra Club v. Union Oil of California,* 813 F.2d 1480, 1493 (9th Cir. 1987).

Third, plaintiff's first amended complaint sets forth a claim for federal antitrust relief. Plaintiff necessarily

must argue that the antitrust state action immunity doctrine under *Patrick v. Burget* does not apply, yet plaintiff has already acknowledged that the antitrust state action immunity doctrine recognized in *Patrick v. Burget* applies to the California peer review scheme. Plaintiff is " 'playing fast and loose with the courts.' " *Matek v. Murat, supra,* 638 F.Supp. at 783.

Finally, plaintiff's first amended complaint contains an additional claim for declaratory relief. As discussed above, not only has plaintiff failed to allege subject matter jurisdiction independent of this remedy, but plaintiff cannot properly seek a declaratory judgment against moving defendants. In light of the inappropriateness of declaratory relief against moving defendants, plaintiff's evident intent for adding such a claim can only be to secure federal court jurisdiction. Plaintiff's shopping for a federal forum over a state forum must be deemed an improper purpose subject to sanctions under Rule 11.

For the foregoing reasons, moving defendants justifiably and reasonably contend that plaintiff's first amended complaint is without factual foundation, and is legally unreasonable. Plaintiff was on notice not only from defendants' previous motion to dismiss, but also from this Court's "serious questions" regarding subject matter jurisdiction, that plaintiff does not belong in federal court. Thus, his improper efforts to remain there must be subject to sanctions.

IV.

CONCLUSION.

For the reasons set forth above, Defendants respectfully request this Court to dismiss Plaintiff's complaint in its entirety.

Dated: August 4, 1987

WEISSBURG AND ARONSON, INC.
ROBERT J. GERST
J. MARK WAXMAN
MARK A. KADZIELSKI

By: _____(Signature)_____
MARK A. KADZIELSKI
Attorneys for Defendants

[PROOF OF SERVICE OMITTED IN PRINTING]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[CAPTION OMITTED IN PRINTING.]

OPPOSITION TO MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: Sept. 21, 1987, Time: 10:00 a.m.,
CourtRoom: The Honorable Ferdinand F. Fernandez

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I.

INTRODUCTION

This is a case of first impression. *Never* has a Federal court ruled upon the constitutionality of the Health Care Quality Improvements Act of 1986, 42 U.S.C. § 11111, et seq. ("HCQIA") or state statutes such as §§ 805 and 805.5 of the California Business and professions Code (B&P Code). *Never* has a Federal court had to rule as to whether the state action requirements for the maintenance of a civil rights case arises in light of the operation of those two statutes. *Never* has a Federal court had to rule on the issue of the elements necessary to state an antitrust cause of action after HCQIA. Since "a motion to dismiss should be disfavored, and doubts should be resolved in favor of the pleader", *Williams v. Gorton,* 529 F.2d 668, 672 (9th Cir. 1976), important issues, including civil rights issues, *Guillam v. Orange,* 731 F.2d 1379, 1381 (9th Cir. 1984), should not be decided on a motion to dismiss, *NL Industries, Inc. v. Kaplan,* 792 F.2d 896, 898 (9th Cir. 1986). Understanding plaintiff's case requires an analysis of HCQIA. Thus, plaintiff will first analyze the antitrust claim and then proceed to the civil rights and declaratory claims.

II.

PLAINTIFF'S ANTITRUST CLAIMS

The six arguments asserted by defendants seeking to dismiss the Fourth Count, the antitrust count of plaintiff's First Amended Complaint, are: (1) peer review proceedings deemed "state action" are immunized from antitrust liability, *Patrick v. Burget,* 800 F.2d 1498 (9th Cir. 1986); (2) the plaintiff is estopped from contending that no such immunity exists; (3) the complaint fails to

allege sufficient effects on interstate commerce to assert a federal antitrust claim; (4) the named conspirators are, as a matter of law, incapable of conspiring to violate Section 1 of the Sherman Act; (5) the plaintiff's claims lack the requisite adverse impact on competition; and (6) no antitrust injury is demonstrated in the Complaint. Each assertion is controverted and is entirely without merit.

A. Defendants Are Not Entitled to Immunity

Defendants, relying on *Patrick,* argue that the state action doctrine immunizes defendants' peer review from antitrust liability. The sweeping judicially created immunities afforded by *Partick,* however, have been preempted by the express immunity provisions contained in the HCQIA. Passed after *Patrick,* on November 14, 1986, HCQIA is applicable to this case. It provides standards for medical professional review, and provides conditional immunity from the antitrust laws. 42 U.S.C. §§ 11111-12.

HCQIA expressly immunizes peer review from antitrust liability provided that the peer review committees meet the requirements set forth in § 11112. Specifically, HCQIA grants immunity only to those peer reviews undertaken with: (1) the reasonable belief that the action is in furtherance of quality of health care, (2) a reasonable effort to obtain the facts, (3) adequate notice and hearing procedures and (4) a reasonable belief that the review was warranted by the facts known after reasonable efforts to obtain facts and after affording the physician adequate notice and hearing procedures.

The allegations of plaintiff's complaint, deemed true on a motion to dismiss, detail the facts showing that defendants' peer review failed to meet the § 11112 standards, ¶ 126; see also ¶¶ 27-78; as such, defendants' conduct is

not afforded immunity from antitrust liability under HCQIA.

The Court is required to presume that HCQIA's comprehensive standards for antitrust immunity preempt prior case law governing peer review, including the *Patrick* decision. *Milwaukee v. Illinois and Michigan,* 451 U.S. 304, 318, 101 S.Ct. 1784, 1793 (1981); *In re Oswego Barge Corp.,* 644 F.2d 327, 335 (2d Cir. 1981) (presumption in favor of preemption of federal common law whenever it can be said that Congress has legislated on the subject). Under this rule, courts must presume that federal common law has been preempted as to every question to which the legislative scheme spoke directly and every problem that Congress has addressed. *Oswego,* 664 F.2d at 335.

In its subsection entitled "Limitation on damages for professional review actions", HCQIA speaks directly to the issue of what immunity should be afforded to peer review activities. Congress intended by HCQIA to encourage good faith professional review activities by removing any impediment to physician participation in the peer review created by the fear of liability. The legislative history reveals that Congress was particularly concerned with physicians' exposure to antitrust suits, H.R. Rep. No. 99-903, 99th Cong., 2d Sess. 3, *reprinted in* 1986 U.S. Code Cong. & Ad. News 6384, 6385-86, and felt "that some immunity for the peer review process is necessary." *Id.* at 6391.

The existence of a comprehensive grant of conditional immunity for peer review committees compels the conclusion that Congress intended this act to supercede existing judicially-created immunities. See *Oswego,* 664 F.2d at 343. In fact, the House debate on the bill acknowledged particularly the immunity accorded by the Ninth Circuit in *Patrick,* see 132 Cong. Rec. H9960-62 (Oct. 14, 1986),

and rejected *Patrick's* grant of immunity based solely on the state legislated mandate authorizing peer review without regard to the due process considerations.

The narrower immunity afforded under HCQIA is grounded on considerations wholly separate and distinct from those presented in the state action immunity articulated in *Patrick.* HCQIA's immunity provisions are triggered by the hospital's compliance with the protections enumerated in § 11112. Under HCQIA, therefore, the immunity extends only to peer reviews undertaken for appropriate "quality of care" purposes and pursuant to articulated requirements of procedural regularity. 132 *Cong. Rec.* H9957 (Oct. 14, 1986). Conversely, the state action immunity afforded by *Patrick* is grounded not on the particularities of the individual peer review, but rather on the nature of the legislative mandate which authorizes physician peer review. Where, as in *Patrick,* it is clear that the legislature intended "to replace competition with regulation in the relevant market", antitrust immunity will attach. *Patrick,* 800 F.2d at 1505.

To permit the immunity conferred by the Court in *Patrick* to remain in force would, therefore, contradict express Congressional intentions and render HCQIA's express immunity provisions wholly superfluous. Such a construction, therefore, is unjustified. Cf., *Jackson v. Kelly,* 557 F.2d 735, 740 (10th Cir. 1977) (Congress cannot be presumed to have enacted a wholly superfluous statute).

Nor is the blanket state action immunity afforded peer review activities by *Patrick* consistent with the narrower conditional immunities authorized by HCQIA. As its legislative history make clear, Congress granted only limited antitrust immunity to peer review, noting in particular its intention not to "insulat[e] improper anticom-

petitive behavior from redress." 1986 U.S. Code Cong. & Ad. News at 6386. "[A]ctions that are really taken for anticompetitive purposes will not be protected under this bill." 132 Cong. Rec. H9957 (Oct. 14, 1986).[1]

Given the inconsistent rationales for the immunity afforded by HCQIA versus the *Patrick* decision and the different degree of protections afforded under each, the express legislative mandate would be frustrated were *Patrick* not to be considered preempted. See *Oswego*, 664 F.2d at 343. As presented by the facts of this case, the application of judicially-created state action immunity to the peer review activities authorized by the State of California would vitiate the need for these groups to satisfy procedural requirements for antitrust immunity which HCQIA expressly requires. One of its critical objectives, the introduction of procedural uniformity into the peer review process, would be lost. Thus, in order to preserve its express provisions, inconsistent federal case law, such as the *Patrick* opinion, must be considered preempted. See *City of Milwaukee*, 451 U.S. at 320, 101 S.Ct. at 1794; *Oswego*, 664 F.2d at 344 (judge-made rules

[1]In describing the rationale behind the limited immunity conferred on peer review proceedings by HCQIA, the House Report stated:

> "Initially, the Committee considered establishing a very broad protection from suit for professional review actions. In response to concerns that such protection might be abused and serve as a shield for anti-competitive economic actions under the guise of quality controls, however, the Committee restricted the broad protection. As redrafted, the bill now provides protection only from damages in private actions, *and only for proper peer review, as defined in this bill* . . . If the professional review actions being challenged fail to meet the standards of section 102(a), no immunity is provided and the suit can be tried without regard to the provisions of this bill." 1986 U.S. Code Cong. & Ad. News at 6391 (emphasis added).

may not rewrite rules that Congress has affirmatively and specifically enacted).

Patrick does not survive HCQIA for additional reasons. Congress, aware of the immunity granted by *Patrick*, nonetheless did *not* include an immunity for "state action" arising out of peer review. If Congress has acted to grant an exception, it is presumed that that is the only exception it intended to grant, *Andrus v. Glover Const. Co.*, 466 U.S. 608, 616, 100 S.Ct. 1905, 1910 (1980).

> "We have noted that immunity from the antitrust laws is not lightly inferred. [Citations omitted.] Immunity of regulated activities from the antitrust laws depends on congressional intent: the inclusion of an express statutory exemption . . . implies that conduct not covered by the statute remains subject to the antitrust laws. [Citations omitted.]" *Cain v. Air Cargo, Inc.*, 599 F.2d 316, 320 (9th Cir. 1979.)[2]

B. Plaintiff is Not Estopped.

The applicability of HCQIA to this action renders defendants' argument that plaintiff should be estopped from distinguishing *Patrick* moot. See *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208 (9th Cir. 1984), *cert. denied*, 469 U.S. 1197 (1985). Plaintiff never asserted that the decision in *Patrick* controls his civil rights claim

[2]"The *expressio unis* principle is based upon a presumption that by providing a specific remedy, Congress intended to exclude others. Reason dictates that the more thoroughly a bill is considered, the greater likelihood that the *expressio unis* presumption accurately reflects reality." *Keaukaha-Panaewa Comm. Ass'n v. Hawaiian Homes Comm.*, 588 F.2d 1216, 1223 (9th Cir. 1979), *cert. denied*, 444 U.S. 826, 100 S.Ct. 49 (1979).

on this case;[3] rather, what plaintiff asserted was that peer review was held to the "state action" for "antitrust" purposes and that the determination of "state action" was applicable to civil rights cases. Plaintiff maintained that position before and maintains that position today. In any event, defendants misapply the principle of judicial estoppel. Judicial estoppel requires that the position asserted by a litigant be inconsistent with one that it previously persuaded the court to adopt. *Arizona*, at 1215. In this case, this Court appears not to have accepted plaintiff's position or even defendants' mischaracterization of it, and, therefore, judicial estoppel does not apply.

C. Plaintiff Has Adequately Alleged That Defendants' Activities Substantially Affect Interstate Commerce.

If a complaint alleges facts demonstrating that the defendants' business activities, taken as a whole, do not have an insubstantial effect on interstate commerce, the jurisdictional interstate commerce requirements of the Sherman Act are met.[4] *Hospital Building Co. v. Trustees of*

[3]Neither in the original Complaint nor in the First Amended Complaint, did plaintiff affirmatively make such allegation. Plaintiff alleged that defendants were "estopped from denying that the action" which were taken and threatened were "under authority of the laws of the State of California", Compl. ¶ 14, First Amended Compl. ¶ 80.

[4]In evaluating whether this jurisdictional requirement has been satisfied, the Court first identifies a relevant aspect of interstate commerce. Then it evaluates the defendants' activities, taking into account their overall effect on interstate commerce and not simply their effect on the particular plaintiff. If these activities are shown "as a matter of practical economics" to have a not insubstantial effect on interstate commerce, the jurisdictional standard is satisfied. *Palmer v. Roosevelt Lake Log Owners Ass'n, Inc.*, 651 F.2d 1289, 1291 (9th Cir. 1981). At this preliminary inquiry, therefore, it is unlawful

Rex Hospital, 425 U.S. 738, 743, 96 S.Ct. 1848, 1852 (1976); *Hahn v. Oregon Physicians Service, supra.* The complaint need only show that the defendants' activities well place " 'unreasonable burdens on the free and uninterrupted flow' of interstate commerce." *Rex Hospital*, 425 U.S. at 746, 96 S.Ct. at 1853; *Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center*, 721 F.2d 68, 74 (3rd Cir. 1983). Thus, wholly local activities may satisfy the jurisdictional requirements if they adversely affect interstate commerce, *Rex Hospital*, 425 U.S. at 743, 96 S.Ct. at 1851; *McLain v. Real Estate Board, Inc.*, 444 U.S. 232, 237, 100 S.Ct. 502, 506 (1980).

The requirement of an effect on interstate commerce considers both the plaintiff's and defendant's activities as relevant. *Hahn*, 689 F.2d at 844. The plaintiff's interstate contacts are relevant because the jurisdictional requirement may be satisfied by showing that defendants' activities affect interstate commerce through their effect on plaintiff's interstate activities. *Id.*: see, *e.g., Rex Hospital*, 425 U.S. 738, 96 S.Ct. 1848. However, if the plaintiff's interstate contacts are insubstantial, jurisdiction may also be established directly by the defendants' activities. *Hahn*, 689 F.2d at 844; *Western Waste Service Systems v. Universal Waste Control, Inc.*, 616 F.2d 1094, 1097 (9th Cir. 1980), *cert. denied*, 449 U.S. 869 (1980).

The complaint[5] identifies the relevant aspect of interstate commerce as the provision of eye medicine and

conduct itself, that will be evaluated. *Hahn v. Oregon Physicians Service*, 689 F.2d 840, 844 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983).

[5]As on all motions to dismiss a complaint, this court must take the complaint's allegations as true and cannot dismiss the complaint unless it is beyond doubt that the plaintiff can prove no set of facts consistent with the complaint that would establish the requisite nexus

ophthalmologic surgery, see ¶¶ 121-122. Within this line of commerce, the complaint enumerates specifically those activities of the defendant which adversely affect interstate commerce — both indirectly, through their effect on Dr. Pinhas' interstate contacts, and directly through the defendants' contacts.

As to the plaintiff's interstate contacts, the complaint specifically alleges that Dr. Pinhas has a national and international reputation as a specialist in corneal eye problems, ¶ 22. It also alleges that Dr. Pinhas receives substantial revenues from Medicare, the federal health insurance program for the elderly. *Id.* ¶¶ 24-26. In addition, it states that the defendants' termination or restriction of Dr. Pinhas' staff privileges will prevent him from practicing in Los Angeles and at other hospitals in the United States by virtue of the mandatory federal and state reporting requirements, ¶¶ 124-25.[6]

The interstate character of a physician's practice and the interstate payment of fees by Medicare or other insurance companies are well-recognized methods for demonstrating the requisite effect on interstate com-

with interstate commerce. *McLain v. Real Estate Board, Inc.*, 444 U.S. 232, 246, 100 S.Ct. 502, 511 (1980); *Marrese v. Interqual, Inc.*, 748 F.2d 373, 380 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985); *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir. 1980), *cert. denied*, 449 U.S. 869 (1980).

[6]California law requires hospitals, and federal law provides antitrust immunity if hospitals, report termination or restriction of privileges, ¶¶ 80-84, 90. Defendants have threatened to file such reports concerning Dr. Pinhas, ¶¶ 92-93. Hospitals are required to request such reports before granting or renewing staff privileges, ¶¶ 80-84, 90, 100-02. Hospitals commonly refuse to admit physicians whose reports cast doubt on their competence or on the quality of their patient care, ¶¶ 103, 124. Hence, defendants effectively control plaintiff's access to other hospitals in addition to Midway, ¶¶ 124-25.

merce. *Marrese v. Interqual, Inc.*, 748 F.2d 373, 377-78, 382-83 (7th Cir. 1984); *Cardio-Medical*, 721 F.2d at 76. Moreover, the allegation that a physician will not be able to practice medicine because other hospitals will not risk granting privileges to a physician whose privileges have previously been terminated or restricted has also been found sufficient. *Marrese*, 748 F.2d at 378, 380, 383.

The complaint alleges the defendants' substantial interstate business activities and that defendants receive substantial revenue from Medicare, ¶¶ 24-26. In addition, the complaint alleges that defendant Summit Health, Ltd. owns and operates approximately 19 hospitals and 49 nursing home facilities in California, Arizona, Colorado, Oregon, Iowa, Washington, Texas and Saudi Arabia, ¶ 6.[7]

D. Plaintiff Has Properly Alleged an Antitrust Conspiracy.

Plaintiff alleges a conspiracy to boycott Dr. Pinhas and eliminate him from the market for ophthalmologic surgery among the following defendants: (1) Summit health and Midway Hospital,[8] (2) the Medical Staff, (3) Dr. Reader,

[7]Plaintiff has not had an opportunity to conduct discovery on the full scope and extent of defendants' activities in interstate commerce. It is well established that courts should not dismiss the complaint before affording the plaintiff discovery on the jurisdictional matters. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 602 (9th Cir. 1976). Therefore, should this Court determine that plaintiff's interstate contacts are insufficient at this pleading stage to establish the interstate commerce element, plaintiff requests discovery before this court rules on defendants' motion.

[8]The rule regarding a parent's ability to conspire with its subsidiary articulated in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 2741 (1984), applies only to those entities which are wholly-owned. As Summit Health may own less than 100% of Midway, the possibility of a conspiracy post-*Copperweld* is not

Dr. Lurvey, Dr. Macy, Dr. Salz and Dr. Perlman, (4) Mr. Feldman, regional vice-president Summit Health, and (5) Mr. Kadzielski and Weissburg & Aronson, counsel for defendants. ¶¶ 6-15, 17-18, 122, 124. Defendants argue that these parties are legally incapable of conspiring on three grounds: (1) the Hospital, its parent, the Medical Staff and its member doctors constitute a "single entity"; (2) the medical staff and individual defendants are the equivalent of corporate officers and employees; and (3) Mr. Kadzielski and Weissburg & Aronson were acting merely as agents for the defendants. These arguments, entirely without factual merit, are inappropriate on a motion to dismiss.

The nature of the defendants' relationships and their ability to conspire is a question of fact. ***Los Angeles Mem. Coliseum Comm. v. National Football League,*** 726 F.2d 1381, 1387 (9th Cir.), *cert. denied,* 469 U.S. 990 (1984). At the pleading stage, the plaintiff need only allege sufficient facts to identify the participants to and nature of the conspiracy. ***BBD Trans. Co. v. Southern Pacific Trans. Co.,*** 627 F.2d 170, 173 (9th Cir. 1980). Plaintiff has clearly satisfied this requirement.

1. The Hospital, Its Parent, the Medical Staff and Individual Physicians Do Not Constitute a Single Entity.

Capacity to conspire is determined by a factual analysis of the economic substance of the business association. *Coliseum,* 726 F.2d at 1387. It is by now axiomatic that independent and competing economic actors in an association are legally capable of conspiring within the meaning

precluded. However, should plaintiff discover that the subsidiary is wholly-owned, plaintiff will amend the complaint to eliminate its intraenterprise conspiracy allegations.

of Section 1 of the Sherman Act. *Coliseum,* 726 F.2d at 1387-90; see also *United States v. Topco Association, Inc.,* 405 U.S. 596, 609, 92 S.Ct. 1126, 1134 (1972); *United States v. Sealy, Inc.,* 388 U.S. 350, 352-53, 87 S.Ct. 1847, 1849-50 (1967); *Associated Press v. United States,* 326 U.S. 1, 26, 65 S.Ct. 1416, 1427 (1945).

The Third Circuit has specifically held that a hospital medical staff is a combination of individual doctors and that the staff's actions satisfies the conspiracy requirement of Section One. *Weiss v. York Hospital,* 745 F.2d 786, 814 (3d Cir. 1984), *cert. denied,* 470 U.S. 1060 (1985); see also *Quinn v. Kent General Hospital, Inc.,* 617 F.Supp. 1226, 1242 (D. Del. 1985). The Court in *Weiss* reasoned that:

> "The . . . medical staff is a group of doctors, all of whom practice medicine in their individual capacities, and each of whom is an independent economic entity in competition with other doctors in the . . . medical community. Each staff member, therefore, has an economic interest separate from and in many cases in competition with the interests of other medical staff members. Under these circumstances, the medical staff cannot be considered a single economic entity for purposes of antitrust analysis."

Id. at 815. Members of the medical staff, including those who do not practice in the same specialty, compete for such things as operating rooms and hospital beds, and therefore have an economic interest in limiting the number of physicians admitted to the staff. *Quinn,* 617 F.Supp. at 1242.

The defendant Medical Staff and the individual defendant physicians are therefore capable as a matter of law of conspiring with each other to exclude competitors. *Id.*

at 1242. Plaintiff's complaint alleges that the Medical Staff is an unincorporated association comprised of independent physicians who are competitors, ¶¶ 8, 10-11, 13-15. Dr. Lurvey is Chief of Staff and is a practicing physician and surgeon, ¶ 11. Drs. Reader, Macy, Salz and Perlman are members of the Medical Staff and compete with each other and Dr. Pinhas as eye physicians and ophthalmologic surgeons, ¶¶ 10-11, 13-15.

The plaintiff has clearly alleged sufficient facts to plead the existence of a conspiracy among independent entities. No more is required at the pleading stage.

2. Even Were This Court to Accord the Medical Staff and Individual Defendant Physicians Employee Status, the Defendants Have Independent Economic Interests and Are Therefore Legally Capable of Conspiring.

As a general rule, "individual officers, directors or agents within a single corporation, acting on behalf of that corporation, are considered incapable of conspiring with each other or with their corporation." *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455 n.7 (9th Cir. 1979). However, if employees act for their own independent economic interests, and outside the interests of the corporation, they are legally capable of conspiring with each other and the corporation. *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380, 387 (10th Cir. 1985); *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399-4 (4th Cir. 1974) (when employees have competitive interests apart from the corporation, the courts have found the existence of conspiracy).

Plaintiff's complaint alleges the type of independent economic stake sufficient to confer the ability to conspire. *Tiftarea Shopper, Inc. v. Georgia Shopper, Inc.*, 786 F.2d 1115, 1118 (11th Cir. 1986); *Motive Parts*, 774 F.2d at 387-88. The complaint alleges that individual members of the Medical Staff, who compete with Dr. Pinhas, will benefit by obtaining the eye care and ophthalmologic surgery patients that would otherwise have been patients of the excluded competitor, Dr. Pinhas, ¶ 122. In addition, the complaint alleges an independent interest of the doctors and the hospital staff in ensuring the continuation of Midway's assistant surgeon program, ¶ 124. Through their boycott of Dr. Pinhas for his refusal to employ surgeons for procedures not requiring such assistance, defendants were pursuing individual financial interests solely distinct from, and to a degree antagonistic to, those of the hospital, which would be best served by eliminating unnecessary or redundant surgical personnel and by complying with Medicare regulations. Thus, the plaintiff has alleged substantial interests of the defendants which are separate and independent from that of the hospital. The defendants' arguments to the contrary must be rejected.

3. Lawyers May be Antitrust Conspirators.

Defendants argue Mr. Kadzielski and Weissburg & Aronson ("W&A") should be dismissed because these defendants acted merely as agents of the remaining defendants. However, a principal and agent can conspire if the agent materially aided the accomplishment of the scheme with knowledge of the anticompetitive purpose of the plan. *Albrecht v. Herald Co.*, 390 U.S. 145, 150, 88 S.Ct. 869, 871 (1968); see also *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1265-66 (8th Cir.), *cert. denied*, 449 U.S. 1063 (1980). *Tillamook Cheese & Dairy Ass'n v. Tillamook County Cream-*

ery Ass'n, 358 F.2d 115 (9th Cir. 1966), establishes that an attorney acting in concert with his client is not immunized from antitrust liability. The court held that when the attorney goes beyond the role of legal advisor and "acting by himself or jointly with others, makes policy decisions for the corporation, then he subjects himself to liability. . . ."[9] *Id.*

The complaint alleges that W&A retained Mr. Posell as hearing officer because Mr. Posell ensures that such committees achieve the results that W&A and its clients desire, ¶ 47; W&A had improper ex parte contacts with both Mr. Posell and the hearing panel, ¶¶ 53-55; and W&A ordered its court reporters to delay producing a transcript of the peer review proceedings, so that Dr. Pinhas could not use it in preparing his cross-examination, ¶ 72.

The complaint alleges sufficient independent misconduct by W&A from which this Court may infer that W&A stepped outside its legal advisory role and became an active participant in formulating and implementing defendants' anticompetitive scheme. Defendants' factual assertion that W&A was merely the defendants' agent fails to accept the complaint's allegations as true.

E. Plaintiff Has Alleged a Per Se Unlawful Group Boycott Whose Anticompetitive Effects Are Presumed.

Plaintiff alleges a per se unlawful boycott whereby defendants conspired to deny or restrict the staff privi-

[9]To maintain a cause of action against an attorney, "the plaintiff must plead . . . that the defendant attorney exerted his power and influence so as to direct the corporation to engage in the complained of acts for an anticompetitive purpose." *Brown v. Donco Enterprises, Inc.*, 783 F.2d 644, 646-47 (6th Cir. 1986). It is enough that the attorney became an active participant in formulating policy decisions with his client to restrain competition. *Id.* at 646.

leges of Dr. Pinhas, a competitor, at Midway Hospital. Defendants' argument is that plaintiff has failed to allege that defendants' conduct has had anticompetitive effects. However, once a plaintiff demonstrates that the defendants' conduct falls within a per se category, no allegation or proof of anticompetitive effect is required. The anticompetitive effects are presumed. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212, 79 S.Ct. 705, 709 (1959).

The Supreme Court's decision in *FTC v. Indiana Federation of Dentists*, 107 S.Ct. 2009 (1986), makes clear that even under the rule of reason, horizontal agreements to boycott a competitor are presumptively anticompetitive. *Id.* at 2018. It is the defendants' burden to show some countervailing competitive benefit from the restraint. *Id.* The plaintiff has therefore pleaded anticompetitive effect under either standard for antitrust liability.

To demonstrate a per se unlawful group boycott, the plaintiff must allege that the defendants possess sufficient market power or that defendants control access to a facility necessary to enable the boycott victim to compete. *Id.* Plaintiff's complaint alleges that the defendants control plaintff's access to hospital staff privileges, not only at Midway Hospital but also at other hospitals. Defendants exercise this control by virtue of the reporting requirements for decisions to terminate or restrict a physician's staff privileges imposed by both HCQIA and California law, ¶¶ 83-84, 90-101.

Plaintiff alleges that defendants have threatened and continue to threaten to file reports pursuant to federal and California law concerning Dr. Pinhas, ¶ 93. Any such reports will be distributed to other hospitals, who are obligated to request such reports for physicians whose staff privileges are being renewed or who seek privileges,

¶¶ 100-02. The complaint further alleges that after the decision in *Elam v. College Park Hosp.*, 132 Cal.App.3d 332, 183 Cal.Rptr. 156 (1982), hospitals in California commonly deny admission to the hospital staff to a physician whose report casts any doubt on his competency, ¶ 103. Therefore, defendants effectively control Dr. Pinhas' ability to secure staff privileges at other hospitals, the facilities he needs to compete as an eye physician and ophthalmologic surgeon, ¶¶ 124-25.

F. Plaintiff Has Alleged Antitrust Injury.

Defendants' last argument, a total mischaracterization of plaintiff's claim, is that plaintiff has failed to plead proper antitrust injury. Defendants assert that the only injuries claimed by plaintiff are based on: violation of plaintiff's rights to fair procedure or due process; violation of plaintiff's rights to a timely transcript; and violation of plaintiff's rights to unintimidated witnesses. Defendants' Brief at 19. So described, defendants then assert that these rights are not protected by the antitrust laws.

Contrary to this gross mischaracterization, plaintiff's complaint alleges that the boycott resulted in a lessening of competition in the market for ophthalmologic surgery by foreclosing Dr. Pinhas' market participation, ¶ 122. Such a reduction in competition constitutes the very kind of injury which the antitrust laws seek to prohibit. The alleged procedural irregularities focused on by the defendants are merely enabling devices to effectuate defendants anticompetitive group boycott.[10] Had the

[10]Defendants reliance on *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 105 S.Ct. 2613 (1985) is misplaced. Concededly, that decision held that if the defendants' conduct does not violate § 1, the failure to afford the plaintiff procedural protections is irrelevant. The plaintiff's complaint, however, does not claim that the lack of procedural protections associated with the defendants' peer review activities constitute the actionable conduct. Thus, the rule of *Northwest Stationers* is not implicated in the present case.

defendants boycotted Dr. Pinhas without using peer review, their unlawful restraint would still violate the antitrust laws. As plaintiff has alleged proper antitrust injury, the defendants' argument to the contrary must be denied.

G. Abstention From Antitrust Claim is Improper Where Federal Courts Have Exclusive Jurisdiction.

Abstaining from exercising jurisdiction in cases where the federal courts have exclusive jurisdiction defeats the legislation. *Key v. Wise,* 629 F.2d 1049, 1059 (5th Cir. 1980), *cert. denied,* 454 U.S. 1103, 102 S.Ct. 682 (1981). It provides the aggrieved with no forum for adjudication of his claim. In the instant case, Sherman Act claims are vested exclusively in the federal courts. *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.,* 252 U.S. 436, 440, 40 S.Ct. 385 (1920); *General Inv. Co. v. Lake Shore & M.S. Ry. Co.,* 260 U.S. 261, 287, 43 S.Ct. 106 (1922). See also *Union Oil Co. v. Chandler,* 4 Cal.App.3d 716, 84 Cal.Rptr. 756 (1970), confirming that California state courts have no jurisdiction over federal antitrust claims. This Court may not turn away Dr. Pinhas' antitrust claim.

III.

THE CIVIL RIGHTS ACTIONS[11]

A. The § 1983 Claim.

The allegations necessary to maintain a § 1983 civil rights action are that defendant (1) acted under color of state law and (2) deprived plaintiff of a right, privilege or immunity protected by the Constitution. *Cohen v. Norris,* 300 F.2d 24, 30 (9th Cir. 1962) (en banc).

1. Color of State Law.

In order to show that defendants were acting "under color of state law" it is not necessary to allege that the action taken was authorized by the state; however, facts must be stated showing that defendants were clothed with authority of the state and were purporting to act thereunder. See, *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598 (1970);[12] *Marshall v. Sawyer,* 301 F.2d 639 (9th Cir. 1962).

Unlike defendants who of course find no "state action" resulting from general regulation, *Freier v. New York Life Ins. Co.,* 679 F.2d 780, 783 (9th Cir. 1982) ("The mere fact that a business is regulated by state law or agency

[11]HCQIA, § 11111(a)(1) specifically recognizes that its immunity does not protect against actions brought pursuant to 42 U.S.C. §§ 1983 and 1985.

[12]The continued vitality of *Adickes* is proved by the Court's reliance on its holding in *Lugar v. Edmondson Oil Co. Inc.,* 457 U.S. 922, 941, 101 S.Ct. 2744, 2756 (1982). There, a § 1983 claim against private persons, causing a state official to seize plaintiff's property pursuant to a constitutionally suspect attachment statute, was upheld. There, as here, there is joint participation, pursuant to statutes which cause harm to Dr. Pinhas.

does not convert its dealing to acts 'under color of state law.' "), here there is state regulation covering specifically the very points at issue. The State requires peer review, and failure to have peer review may cost a hospital's state license (22 Cal. Admin. Code § 70701, et seq.). The State requires that peer review proceedings be kept confidential (Cal. Evid. Code §§ 1156 and 1157). Like the acts of state officials prosecuting and adjudicating matters, the State provides a broad general immunity to participants in peer review including witnesses (Cal. Civ. Code § 43.7). The State not only provides judicial review but the jurisdictional statutes makes specific provisions regarding hospital peer review proceedings (Cal. Code Civ. Proc. § 1094.5). The State accumulates information regarding physicians adversely affected by peer review and uses the mandatory 805 Reports for its own investigations (B&P Code § 805). Most significantly, however, what distinguishes this case from every other reported decision is that the State under compulsion distributes this information to other hospitals, health care service plans and medical care foundations (B&P Code § 805.5).[13] Less state involvement has supported a finding of private persons acting under "color of state law."

In *Marshall v. Sawyer, supra,* the state of Nevada published and distributed a "black book" to casinos listing the names of unsuitable persons. It transmitted this "black book" with a suggestion that casinos preclude such persons from entering gambling establishments. One John Marshall, so excluded, brought a § 1983 action against the state and casino's operators. The court held that there was sufficient nexus between the State and the

[13]Under HCQIA the State is required to collect and distribute similar reports from Hospitals in order for the Hospitals to comply with HCQIA, 42 U.S.C. § 11133, et seq.

casino operators' action, the distribution of the names and the control over licensure of the casino's operations that plaintiff stated a § 1983 claim against the casino operators:

> "The defendants' conduct was engaged in under color of state law if they were clothed with authority of the state and were purporting to act thereunder, whether or not the conduct complained of was authorized, or indeed even if it was proscribed by state law." *Marshall, supra,* at 646.

Distribution of adverse information distinguishes this case from all the cases cited by defendants. Distribution of adverse information involves the State of California in the entire peer review process. Defendants do not cite, and cannot cite, any case which involves distribution of adverse information. No case interprets the effect of § 805.5 of the B&P Code and § 423 of HCQIA. Those statutes involve non-state defendants in sufficient state activities to state a claim for relief under § 1983. The acts of listing John Marshall in Nevada's "black book" or posting Grace Constantineau's picture in Wisconsin's liquor stores, *Wisconsin v. Constantineau,* 400 U.S. 433, 91 S.Ct. 507 (1971), are indistinguishable from causing distribution of Dr. Pinhas' name by listing him with BMQA pursuant to §§ 805 and 805.5 and 42 U.S.C. § 11133; each involves similar state action.

No court has yet determined that the State's involvement in accordance with B&P §§ 805 and 805.5 does not constitute "state action" for a § 1983 or § 1985 claim. Plaintiff continues to cite *Patrick, supra,* for the notion that if there is sufficient "state action" to invoke an antitrust immunity, the same facts are sufficient to sustain a finding of "state action" in the civil rights context.

The regulatory scheme set forth in *Patrick,* as far as it goes, is indistinguishable from the California scheme, except that Oregon has *less* state activities. Oregon has no "dissemination statute" like California's (B&P Code § 805.5).[14]

2. Due Process.

Dr. Pinhas' due process rights were violated when his medical staff privileges were summarily suspended on April 13, 1987, absent any notice and without any opportunity for hearing, ¶ 29. Dr. Pinhas' rights were violated. Defendants, more than a month thereafter, afforded Dr. Pinhas a "hearing", without sufficient disclosure of the charges against him, with a biased hearing officer, a biased hearing panel, interfered and threatened his witnesses, precluded him from calling hospital witness, and precluded him from being represented or even *consulting* retained counsel, ¶ 37.

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[14]The so called trilogy of "doctor cases" relied upon by defendants are not dispositive of the state action requirement. In *Aasum v. Good Samaritan Hospital,* 542 F.2d 792 (9th Cir. 1976), no argument was made, nor did the court consider, whether peer review proceedings supervised by the state, and provided under mandatory regulation, constituted state action.

Neither *Ascherman v. Presbyterian Hospitals,* 507 F.2d 1103 (9th Cir. 1974) nor *Watkins v. Mercy Medical Center,* 520 F.2d 894 (9th Cir. 1975), is dispositive or addresses the issues raised herein. Nonetheless, Judge Duniway, concurring in *Ascherman,* said:

> "Presumably, although we need not so decide, if the hospital took some action under applicable state regulations, that action would be 'state action'." 507 F.2d at 1105.

a. Due Process Guarantees the Right to Retained Counsel.

Research discloses no federal case which squarely decides the issue of whether due process requires the right to retained counsel at hospital disciplinary proceedings. State law is in conflict. In New Jersey, the right to retained counsel is guaranteed, *Garrow v. Elizabeth General Hospital,* 79 N.J. 549, 401 A.2d 533 (1979). In California, as long as the hearing panel has discretion to decide, the courts hold no due process violation exists for the exclusion of retained counsel. *Anton v. San Antonio Comm. Hospital,* 19 Cal.3d 802, 140 Cal.Rptr. 442 (1977). HCQIA is instructive.[15]

HCQIA provides that "a health care entity is deemed to have met the adequate notice and hearing requirement . . . if . . . the physician involved has the right . . . to representation by an attorney or other person of the physician's choice . . ." 42 U.S.C. § 11112(b)(3)(C)(i). By the passage of HCQIA with its list of due process rights, 42 U.S.C. § 11112, et seq., Congress determined that due process requires, among other things, *retained counsel at a medical peer review proceeding.* The reason is simple. As set forth in Section 2f, *infra,* Dr. Pinhas has a property interest in the outcome of these hearings. Under HCQIA, §§ 805 and 805.5 the government uses the result of these hearings for the purpose of accumulating information about physicians and *disseminating* this information to others. This act of government, as Congress recognized,

[15]The application of HCQIA is conditional in that a hospital may secure antitrust immunity by full compliance with HCQIA. What distinguishes HCQIA from California's B&P Code, §§ 805 and 805.5, is that the 805 Report and the dissemination of the 805 Report is mandatory. As such the right to retained counsel is essential to comply with due process of law.

now requires that the hearing reach a result *only* after the physician has been given due process of law, including right to counsel.[16]

Therefore, Dr. Pinhas was entitled to, but was wrongfully denied, the right to be represented by retained counsel.

b. Due Process Guarantees an Unbiased Hearing Panel and Hearing Officer.[17]

Two members of Dr. Pinhas' hearing panel are ophthalmologists, in direct economic-competition with Dr. Pinhas, ¶ 38. Defendants also selected a hearing officer who, with his law firm, brings in results consistent with the desires of hospital counsel, ¶ 47.[18] As such, defendants selected a tainted panel in violation of the due process clause.

Any person with a "substantial pecuniary interest in legal proceedings should not adjudicate these disputes." *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437 (1927); *Commonwealth Coatings Co. v. Continental Cas. Co.,* 393 U.S. 145, 89 S.Ct. 337 (1968); *Ward v. Monroeville,* 409 U.S.

[16]A right to counsel is also mandated by decisional law in analogous contexts. In *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011 (1970); *Lassiter v. Dept. of Social Services,* 452 U.S. 18, 101 S.Ct. (1981); *Matthews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893 (1976).

[17]HCQIA, § 11112(b)(3)(A)(ii), recognizes that the hearing officer should be unbiased and that the panel should not be composed of competitors, § 11112(b)(3)(A)(iii).

[18]Dr. Pinhas, concerned that Midway might appoint a biased hearing officer, in his demand for hearing (¶ 33, Exhibit "E") "request[ed] a hearing officer who is a retired judge of the Superior Court, or, in the alternative, someone whose impartiality cannot be questioned." That request was denied. See ¶¶ 37-38 and Ex. "F" thereto.

57, 93 S.Ct. 80 (1972); *Aetna Life Insurance Company v. La Voie*, 106 S.Ct. 1580 (1986). The principle applies to administrative hearings and judges, including the hearing officers. *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689 (1973).

Here, the potential of a biased and prejudiced hearing panel and hearing officer is patent. Defendants appointed a panel consisting of ophthalmologists in active economic competition with plaintiff, and members of defendants' own medical staff, physicians subject to the control, persuasion and undue influence of defendants, and a hearing officer known to do defendants' bidding, ¶ 37-47.

c. Due Process Guarantees the Right to Call Witnesses.[19]

Notice and an opportunity to be heard are meaningless rights unless there is a power to compel witnesses, especially witnesses in the control of the defendants here. Dr. Pinhas sought to call the persons bringing the charges, defendant Dr. Lurvey and the person signing the charges, Mr. Feldman, but the hospital refused to permit them to be called or to compel, although it was within their power to do so, their attendance at the hearing, ¶ 63. Cf., *Keener v. Tennessee*, 281 F.Supp. 964, 971 (E.D. Tenn. 1968) ("[N]othing short of a new trial could remedy the error committed by the denial of process for witnesses.")

[19]HCQIA, § 11112(b)(3)(C)(iii), sets forth that the right to call witnesses is required for due process.

d. Due Process Guarantees Adequate Notice.[20]

Defendants deprived Dr. Pinhas of any real opportunity to prepare for the hearing, denying him "notice" which is a key element of due process. Procedural due process requires that parties are entitled to be heard at a meaningful time and in a meaningful manner. *Orloff v. Cleland*, 708 F.2d 372, 379 (9th Cir. 1983).

The May 7 Notice of Hearing contained charges in broad, general terms. It then listed approximately 128 patient charts that allegedly supported the charges. That was the "notice" given to Dr. Pinhas, Compl. Ex. "F". Dr. Pinhas' objections to the Notice, Comp. Ex. "G", and a motion for full disclosure of all charges against him, Comp. Ex. "J", were denied.

e. Due Process Guarantees the Right to Cross-Examine and Confront Witnesses.[21]

The constitutional right to confrontation and cross-examination cannot be doubted. Indeed, the Bylaws of Midway provide for confrontation and cross-examination. However, it is a denial of a constitutional magnitude to provide for the "right" of confrontation and cross-examination and to deny the means to effectuate those rights. No detailed study is necessary to determine why the right to cross-examination, even if it were not included in the Bylaws, would be required by due process. The right to cross-examination is essential to the fact finding process of adversary proceedings — the great engine of truth as it was once called by Professor Wigmore. "And the right to

[20]HCQIA, § 11112(b)(1) and (b)(2), recognizes that adequate notice is an element of due process.

[21]HCQIA, § 11112(b)(3)(C)(iii), recognizes that confrontation and cross-examination are required for due process.

a hearing embraces an 'adequate opportunity . . . to defend . . . .' *Louisville and Nashville R.R. Co. v. Schmidt*, 177 U.S. 230, 236, (1900)." *Christhilf v. Annapolis Emergency Hospital Ass'n., Inc.*, 496 F.2d 174, 178 (4th Cir. 1974).

The right of a litigant to defend includes: "the right to present evidence in his behalf, the right to rebut evidence against him, and the right of cross-examination." *Id.* at 179. The due process clause "grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148 (1982). Most significantly, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269, (1970); *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959).

By precluding counsel's participation at any level, defendants are giving that right with one hand and making it impossible to exercise with the other.

f. Dr. Pinhas Has a Property Interest in Maintaining His Medical Staff Privileges.

Dr. Pinhas has *a property* interest in maintaining his medical staff privileges. A wrongful dissemination of a report pursuant to HCQIA and § 805.5 would have a devastating effect upon Dr. Pinhas' staff privileges at the hospital, see *Haller v. Burbank Comm. Hospital Foundation*, 149 Cal.App.3d 650, 197 Cal.Rptr. 451 (1983). As previously explained, any erroneous report would be available to hospitals that currently, or in the future, will have given Dr. Pinhas medical staff privileges. An erroneous report is just as devastating to Dr. Pinhas' good name and reputation, as in *Wisconsin v. Constantineau*, 400 U.S.

433, 91 S.Ct. 507 (1971), where the court held that posting a notice in a retail liquor stores that sales or gifts of liquor to someone was forbidden without notice was a breach of that person's due process. The court stated:

> "... The only issue present here is whether the label or characterization given a person by 'posting', though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the *private interest* is such that those requirements of procedural due process must be met." (Emphasis added.) *Id.*, 400 U.S. at 436, 91 S.Ct. at 509. See also, *Marshall v. Sawyer*, 301 F.2d 639 (9th Cir. 1962).

The result is the same, whether there is no due process or defective due process. One's good name or reputation should not be tarnished by government action, and if it does occur, it should occur only after Dr. Pinhas is afforded his rights that are guaranteed by due process. It is the reporting requirements of HCQIA and §§ 805 and 805.5 that plaintiff contends are additional reasons for requiring that he be accorded full due process.

B. The Claim Under § 1985.

This claim rises or falls with this Court's determination of the "state action" issue to be decided herein. Any insufficient allegations can be cured by an amendment to the complaint.

C. This Court May Not Abstain From Exercising Its Jurisdiction Over the Civil Rights Action Since the State is Not a "Working Partner" With Defendants.

" '[A]bstention from the exercise of federal jurisdiction is the exception, not the rule'." *McIntyre v. McIntyre*,

771 F.2d 1316 (9th Cir. 1985). Absent 'an important countervailing interest,' (citation), federal courts have 'the virtually unflagging obligation . . . to exercise the jurisdiction given to them,' (citation)." *McIntyre* at p. 1319. "There is no discretion to abstain in a case that does not meet the abstention requirements." *McIntyre* at p. 319. It must further be noted that abstention in civil rights cases is generally disfavored. See *McNeese v. Board of Education*, 373 U.S. 668, 83 S.Ct. 1433 (1963); *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116 (1965); *Mayor of City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 94 S.Ct. 1323 (1974).

Defendants ask this Court to invoke the "Burford abstention doctrine" to this case. *Burford v. Sun Oil Company*, 319 U.S. 315, 63 S.Ct. 1098 (1943).[22] The *Burford* abstention doctrine is best characterized as abstention by the federal court in cases which involve basic matters of state policy *and* where the state is a "working partner" in effectuating review of state administrative orders. *Burford*, *supra*. As set forth below, this case is *not* a case where the court may abstain from exercising jurisdiction.

1. Issues of Federal Health Care Policy are at Stake.

Defendants assert that the action "raises important and sensitive issues of state care health policy", defend-

[22]The defendants have not requested that this Court consider the "Pullman Doctrine" (*Railroad Commission v. Pullman Company*, 312 U.S. 496, 61 S.Ct. 643 [1941]), and with good reason. It could not prevail under the "three prong test" utilized in the Ninth Circuit. See *Conton v. Spokane School District No. 81*, 498 F.2d 840, 845 (9th Cir. 1974). If the language of the statute is "crystal clear", like here, abstention is inappropriate. See *Pue v. Sillas*, 632 F.2d 74 (9th Cir. 1980).

ants' Brief at p. 9. The implementation of HCQIA totally undercuts this argument — HCQIA recognizes and establishes that there is a *federal* health care policy requiring that the standard of health care be consistent *nationwide*. By enacting HCQIA, Congress intended to create a national reporting and data base which could be used by hospitals to assess the professional competence of a practitioner, regardless of geographic location. Thus, any state policy at stake supplements, not supplants, this federal policy.

2. Working Partners.

The Supreme Court justified abstention in *Burford* on the theory that the state court was a "working partner" with the state administrative agency in the business of creating a highly specialized regulatory system for a purely local industry. *Burford*, 319 U.S. at 326, 63 S.Ct. at 1103. The Ninth Circuit has consistently held that absent a statutory scheme which vests administrative review in one set of courts, the *Burford* doctrine does not apply. See, for example, *Rancho Palos Verdes Corp. v. Laguna Beach*, 547 F.2d 1092 (9th Cir. 1976);[23] *Knudsen Corp. v. Nevada State Dairy*, 676 F.2d 374 (9th Cir. 1982). The Ninth Circuit has been cautious in overextending the limited restraint provided by the *Burford* doctrine. *International Brotherhood of Electrical Workers v. Public Service Comm.*, 614 F.2d 206, 211 (9th Cir. 1980).

There is no *state administrative agency* or *agency order* subject to review. California *has not* concentrated challenges to peer review proceedings in any specific court.

[23]The court ultimately determined that the case was appropriate for the *Pullman* abstention doctrine. At p. 1096.

There is no elaborate scheme of review, agency or otherwise. Thus, *Burford* does not apply.

It is also significant that the Supreme Court in *Burford* supported its decision by determining that the state "courts can give fully as great relief, including temporary restraining orders, as the federal courts." The Supreme Court had effectively determined that the relief sought in the federal court was a mirror image of what a state court could grant. Indeed, in *Burford* all the plaintiff sought was equitable relief — to enjoin the enforcement of an order. That same relief was available to the plaintiff in the state court. However, in the instant case, the state court cannot grant Dr. Pinhas comparable relief. Dr. Pinhas may not yet file a petition for a writ of mandate, C.C.P. 1094.5. Defendants, if Dr. Pinhas commences a damage or injunctive action in state court, will seek to have it dismissed as premature, see Defendants' Brief, p. 1, where defendants assert that Dr. Pinhas is precluded from asserting any cause of action in the state courts against any of the defendants until final determination of the administrative proceedings. Defendants rely here and would rely in the state court on *Westlake Community Hospital v. Superior Court*, 17 Cal.3d 465, 131 Cal.Rptr. 50 (1976).

These facts, that there is no pending *state* administration proceeding, there is no *state* judicial proceeding, and there is no plain or speedy *state* remedy available to Dr. Pinhas, also distinguish defendants' misplaced reliance on *Pennzoil, Inc. v. Texaco, Inc.*, 107 S.Ct. 1519 (1987) and *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971).

IV.

PLAINTIFF HAS ADEQUATELY PLED A DECLARATORY RELIEF CAUSE OF ACTION

Defendants have moved to dismiss the First Claim for Relief, not on the ground that it fails to state a claim but, rather, that they should not be participants in litigation over the constitutionality of §§ 805 and 805.5 of the B&P Code and § 423 of the HCQIA, 42 U.S.C. § 11111, et seq. Defendants' participation in the operation of those two statutes is substantial. Pursuant to § 805, the chief of the medical staff and the chief executive officer are required to prepare and file reports. Although there is no discretion in the filing of a report there is a "determination" as to whether a report falls within the criterion set forth in the statute.[24] Defendants, the chief executive officers and chief of medical staff have sole discretion as to what is contained in the "statement detailing the nature of the action, its date, and all of the reasons for and circumstances surrounding the action." Indeed, in connection with this matter, defendant Kadzielski threatened that if Dr. Pinhas would resign, the § 805 report would be "light", but if he challenged the matter in a hearing, the hospital, of course, could make the report "heavy" and "really go after him".

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[24]There is much dispute between "disciplined" doctors and hospitals as to whether staff privileges have been "restricted" at all even if conditions have been placed on privileges; have been restricted for a cumulative total of 45 days; have been restricted within one or more than one calendar year; and whether the action is as a result of a "medical disciplinary cause or reason". Different hospitals take different views as to whether an 805 Report needs to be made when initial "discipline" is imposed or after all appeals have been exhausted. Unfortunately, the resolution of all of these issues is left to the discretion of the hospitals and its lawyers.

To encourage complete discretion in making the reports, the state has protected the defendants from incurring not only civil, but also *criminal* liability as the result of the making of any 805 Report.[25]

Upon the filing of an 805 Report, defendants thereafter are involved as a result of § 805.5. The § 805 Report that defendants file, no matter how abusive, no matter how incorrect, no matter how outrageously achieved, is disseminated to any health care service plan, medical care foundation or hospital that requests it. All hospitals to which plaintiff applies or re-applies for medical staff privileges are required to request the 805 Report. Failure to make a request is a misdemeanor. A hospital may not grant or renew staff privileges for "30 working days" following its request. BMQA distributes "a copy of any report made pursuant to § 805" without any editing. Contrary to defendants' assertions, their actions are not "purely ministerial" and plaintiff has sought, and continues to seek, to enjoin defendants from complying with §§ 805 and 805.5 (see paragraph 1(e) of Plaintiff's Proposed Temporary Restraining Order and Preliminary Injunction) as well as § 423 of HCQIA, because failure to do so causes plaintiff substantial and irreparable injury, *Haller v. Burbank Comm. Hospital, supra.* Indeed, if one is to argue over who has ministerial functions, it is the state that has ministerial functions, especially in light of the fact that under HCQIA a hospital can decide whether it wishes to participate in the invitation to have immunity,[26]

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[25]It is, of course, a misdemeanor to fail to file an 805 report.

[26]Because defendants have not chosen to deal with the constitutional issues raised, only the procedural issues relating to a determination of constitutionality, plaintiff has not further elaborated his constitutional challenge to those statutes.

and under §§ 805 and 805.5, the state must distribute the hospital's 805 Report regardless of its content.

V.

DEFENDANTS' REQUEST FOR SANCTIONS

The proper inquiry under a request for sanctions under Rule 11 is whether the "pleading, motion or other paper" is "well-grounded in fact, that it is warranted by existing law or a good faith argument for an extension, modification or reversal of existing law, and that it is not filed for an improper purpose." *Golden Eagle Distributor Corp. v. Burrows Corp.,* 801 F.2d 1531 (9th Cir. 1986). The court is to address whether a party utilized "frivolous filings" or the use of judicial procedures as a tool for "harassment". *Zaldavar v. City of Los Angeles,* 780 F.2d 823 (9th Cir. 1986). An objective standard of reasonableness is applied. *Zaldavar,* 780 F.2d at 830-31. The Ninth Circuit has repeatedly made the point "that sanctions should not be used to chill an attorneys enthusiasm or creativity in pursuing factual or legal theories." *Hudson v. Moore Business Forms,* 87 D.J. Dar. 5832.

This Court has been requested to rule upon issues never before decided. While defendants may be upset over the prospect that liability may attach to their conduct, this Court must not confuse that issue with its duty to hear and determine novel issues placed before it, even if it will extend liability to those who might have been protected prior to HCQIA.

VI.

CONCLUSION

For the foregoing reasons, plaintiff Simon J. Pinhas respectfully requests that this court deny defendant's Motion to Dismiss in its entirety and order defendants to answer.

Respectfully submitted,

DATED: September 8, 1987

LAWRENCE SILVER
A LAW CORPORATION
LAWRENCE SILVER
AND
BLECHER AND COLLINS
PROFESSIONAL CORP.
MAXWELL BLECHER
ALICIA ROSENBERG

BY: (signature)
LAWRENCE SILVER
Attorneys for
Plaintiff Simon J.
Pinhas, M.D.

(PROOF OF SERVICE OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[CAPTION OMITTED IN PRINTING.]

DEFENDANTS' REPLY TO OPPOSITION TO MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[F.R.Civ.P. Rules 11, 12(b)(1), and 12(b)(6)]
Date: September 21, 1987,
Time: 10:00 a.m., Courtroom: 255

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I.
INTRODUCTION

Plaintiff struggles to maintain his civil rights and antitrust claims. The attempt is made to make this case a "first impression" type of ligitation, to point to facts which are not pled in the Complaint and to generally obfuscate antitrust exemptions. As this reply brief points out: (1) nothing in the Health Quality Improvement Act of 1986 narrows the application of the state action doctrine interpreted in *Patrick v. Burget*, 800 F.2d 1498 (9th Cir. 1986); (2) the interstate commerce cases applicable in this circuit militate against assumption of jurisdiction; (3) plaintiff's attempt to join the lawyers as defendants must be rejected even under the cases plaintiff cites; and (4) the medical staff claims involved are not civil rights claims, but raise only garden variety medical staff issues. For these reasons, the Motion to Dismiss should be granted.

II.
PLAINTIFF'S ANTITRUST CLAIMS

A. The Antitrust State Action Doctrine Is Not Preempted By The Health Quality Improvement Act Of 1986.

Plaintiff argues at length (Opposition, p. 2-5) that the antitrust state action doctrine, as recently interpreted in *Patrick v. Burget*, 800 F.2d 1498 (9th Cir. 1986), has been preempted, at least in the context of medical staff privilege cases, by the immunity provisions contained in the Health Quality Improvement Act of 1986 (P.L. 99-660) 42 U.S.C. §11101, et seq. ("Act"). This argument, however, disregards (and plaintiff does not cite) the plain language of Section 415(a) of the Act which states.

> "Except as specifically provided in this part, nothing in this part shall be construed as changing the liabilities or immunities under law." 42 U.S.C. § 11115(a)

Moreover, plaintiff acknowledges that the immunity afforded under the Act is narrower than that potentially available under the state action doctrine (*e.g.*, the Act requires reasonable belief and good faith whereas the state action doctrine can apply even in the absence of good faith by the defendants). Thus to argue, as plaintiff does, that the Act with its narrower protections has preempted application of the state action doctrine in the context of medical staff peer review proceedings contradicts an express purpose of the statute.

Both plaintiff and defendants recognize that the statute was enacted in response to filing of numerous antitrust cases against physicians participating in effective professional peer review. In Section 402 of the Act, the Congress finds the following:

> "... (4) The threat of private money damage liability under Federal Laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review." 42 U.S.C. § 11101.

It simply does not make sense to construe the Act, whose purpose is to foster effective professional peer review and to curtail the number of financially crippling antitrust lawsuits against participating physicians, as providing a more restrictive and narrow protection than might otherwise exist under existing antitrust law, *i.e.*, the state action doctrine. To the contrary, a consistent interpretation of the purpose, provisions and legislative history of the Act is that it was meant to supplement any existing

immunities, including the antitrust state action doctrine, rather than to supplant them. The state action doctrine, consistent with Section 415(a) of the Act, [42 U.S.C. § 11115(a)] can provide immunity in peer review antitrust litigation where the specific provisions of the Act cannot be invoked.

B. The Complaint Is Insufficient To Demonstrate The Required Nexus With Interstate Commerce For Sherman Act Jurisdiction

Plaintiff's acknowledges that, under *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 100 S.Ct. 502 (1980), Sherman Act jurisdiction must be established by a showing that the defendants' activities affect interstate commerce through their effect on plaintiff's interstate activities or by a showing that the defendants' activities themselves directly affect interstate commerce.

Plaintiff argues that his First Amended Complaint satisfies both of the alternative interstate commerce jurisdictional tests set forth in *McLain*. First he argues that his interstate activities alone are sufficient to invoke Sherman Act jurisdiction. Referring to Pargraphs 24-26 of his Complaint, plaintiff's opposition memorandum states that his practice has a "interstate character" and that he "receives substantial revenues from Medicare." (Opposing memorandum, Page 7 and 8). Yet, the referenced paragraphs in the Complaint, which deal with Midway Hospital's reaction to a Medicare program policy regarding reimbursement of assistant surgeons, do not allege that Dr. Pinhas received any Medicare revenues, much less specify the amount of any such revenues.

Even if, under unique circumstances, a single physician's practice could have a sufficient nexus with interstate commerce to provide a jurisdictional basis for an

antitrust case, Dr. Pinhas' claims do not present such a case. There is no allegation in the First Amended Complaint defining the number of out-of-state patients which Dr. Pinhas has serviced at Midway Hospital nor any allegation of the amount of revenues Dr. Pinhas receives from out-of-state sources.

To satisfy the alternative test set forth in *McLain*, — *i.e.*, that defendants interstate commerce are infected by the alleged illegal activity, Dr. Pinhas' opposition papers (p. 8 lines 11-12) state that defendants have "substantial interstate business activities and that defendants receive substantial revenue from Medicare, ¶¶ 24-26." These are the same paragraphs in the First Amended Complaint which Dr. Pinhas purportedly uses in support of his position that his activities have the requisite nexus with interstate commerce. Yet, a reading of those paragraphs do not contain an explicit allegation that defendants receive substantial revenues from Medicare (much less which of the specific defendants receive such revenues and the magnitude of any such revenues.

Even assuming defendants or at least some of them may receive revenues from the Medicare program, those revenues could not be materially affected by Dr. Pinhas' removal from the staff at Midway Hospital. At most, the extent of interstate commerce affected by the removal of Dr. Pinhas from staff is the number of out-of-state patients Dr. Pinhas currently serves and/or the amount of out-of-state revenues currently received by defendants for services specifically related to eye care and ophthalmic surgery.[1]

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[1]Dr. Pinhas' bold assertion that termination or restriction of his staff privileges at Midway Hospital will, by virtue of mandatory government reporting requirements, prevent him from practicing medicine is preposterous. Even if such a proposition were true,

Consistent with *Hahn v. Oregon Physicians' Service*, 689 F.2d 840 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983) and *Carey v. Daniel Freeman Memorial Hosp.*, 1984-1 Trade Cas. (CCH) ¶ 65,831 (C.D. Cal. November 22, 1983), this court should disregard any interstate commerce impact of the Hospital's overall activities and instead focus only on those hospital activites infected by the alleged violation (*i.e.*, eye care and ophthalmic surgery).[2] Under this test, plaintiff must show that "as a matter of practical economics" the operation of the Hospital's eye care and ophthalmic surgery service has a not insubstantial effect on interstate commerce by affecting the number of eye surgeries performed in Los Angeles which, in turn, would affect the amounts of reimbursement, supplies and equipment, and the number of patients that would move across state lines.[3] Therefore, this court

jurisdiction under the Sherman Act would exist only if such a result would "as a matter of practical economics, have a not insubstantial effect on interstate commerce." *See Palmer v. Roosevelt Lake Log Owners Assoc. Inc.*, 661 F.2d 1289, 1891 (9th Cir. 1981).

[2]Therefore, plaintiff's request (p.8, fn.7 of opposition) that he be entitled to conduct discovery on "the full scope and extent of defendants' activities in interstate commerce" is a request for irrelevant information and should be denied.

[3]Most federal courts faced with antitrust cases involving medical staff privileges have interpreted *McLain's* jurisdictional requirement as mandating a direct connection between the defendants' challenged conduct and interstate commerce. *See generally, Cruis v. Intermountain Health Care Inc.*, 637 F.2d 715 (10th Cir. 1980) (en banc); *Furlong v. Long Island College Hosp.*, 710 F.2d 922 (2nd Cir. 1983); *Weiss v. York Hosp.*, 745 F.2d 786 (3rd Cir. 1984), *cert. denied* 105 S. Ct. 1777 (1985); *Stone v. William Beaumont Hospital*, 782 F.2d 609 (6th Cir. 1986); *Seglin v. Esau*, 769 F.2d 1274 (7th Cir. 1985); *Hayden v. Bracy*, 744 F.2d 1338 (8th Cir. 1984); and *Shahawy v. Harrison*, 755 F.2d 1432 (11th Cir. 1985), *vacated on reh'g.* 1985-2 Trade Cases (CCH) ¶ 66,888 (11th Cir. 1985).

need only consider the effect that the revocation of Dr. Pinhas' privileges has in connection with these components of interstate commerce. His pleading is grossly insufficient in this regard and, accordingly, his antitrust claim should be dismissed for lack of subject matter jurisdiction.

C. The Complaint Is Insufficient To Plead An Antitrust Conspiracy

In his opposition (p.10, 11. 5-7), plaintiff refers to *Weiss v. York Hospital*, 745 F.2d 786, (3d. Cir. 1984) *cert. denied*, 470 U.S. 1060 (1985) for the proposition that "a hospital medical staff is a combination of individual doctors and that the staff's action satisfies the conspiracy requirement of Section One." However, plaintiff fails to reveal that another key ruling of the *Weiss* case was that a medical staff is incapable, as a matter of law, of conspiring with its hospital. *Id.* at 817.

Other aspects of plaintiff's conspiracy allegations are also legally insufficient. First, Midway Hospital is incapable of conspiring with Summit Health, its parent. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731 (1984). Second, plaintiff acknowledges that Mr. Feldman is an employee of Summit and Dr. Lurvey is Chief of Staff of Midway Hospital.[4] Thus,

In determining whether a physician's complaint satisfy the jurisdictional requirements of the Sherman Act, these courts have relied upon the effects of the challenged conduct on specific interstate activities such as the hospital's treatment of out-of-state patients; receipt of Medicare, Medicaid and other out-of-state insurance payments; and the purchase of medicines, equipment and medical supplies from out-of-state vendors.

[4]Moreover, plaintiff has alleged no independent economic interest of Mr. Feldman or Dr. Lurvey from that of Summit Health and/or

consistent with the holding of *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455 fn.7 (9th Cir. 1979), a case cited with approval by plaintiff, neither Mr. Feldman nor Dr. Lurvey, as agents of the hospital, are capable of conspiring with Midway Hospital (and/or Summit Health).

Third, plaintiff argues that his First Amended Complaint "alleges sufficient independent misconduct by W&A from which this Court may infer that W&A stepped outside its legal advisory role and became an active participant in formulating and implementing defendants' anti-competitive scheme." (Opposition, Pages 12-13).

In fact, plaintiff did not specifically plead that Weissburg and Aronson or Mr. Kadzielski participated in formulating the defendants' alleged anti-competitive policy or that Weissburg and Aronson motivated the defendants to engage in anti-competitive activities. In *Brown v. Donco Enterprises, Inc.*, 783 F.2d 644, 646-647 (6th Cir. 1986), cited by plaintiff in his opposition (P. 12, fn.9), the court affirmed the trial court's entry of summary judgment in favor of attorneys, where the complaint had alleged that the attorney engaged in such independent misconduct as conspiring with their client to file and threaten lawsuits so as to coerce, intimidate and compel plaintiffs and other franchisees to purchase exclusively from defendant, and actually drafted letters and threatened and filed lawsuits in furtherance of the illegal conspiracy. Mindful that "attorneys ordinarily act in response to their client's directives," the court refused to infer that counsel "stepped outside of its legal advisory role" and held that summary judgment was appropriate because the complaint did not *specifically* allege that the

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Midway Hospital. Nor has plaintiff alleged that Dr. Lurvey is a competitor of plaintiff.

attorneys served as active participants in formulating the policy, or that they in any way motivated the client to engage in litigation for anti-competitive purposes.

Similarly, Weissburg and Aronson (and its principal Mark Kadzielski) must be dismissed as defendants because plaintiff has failed to state a cause of action under the criteria of *Brown*.

Therefore, the only defendants who, even under the rubric of the *Weiss* case, are legally capable of conspiring are Drs. Reader, Macy, Salz, and Perlman, either among themselves or together with the Hospital. Even if these physicians have competing economic interests to Dr. Pinhas, plaintiff has not alleged any facts to demonstrate that these individuals had anything whatsoever to do with the initiation of the peer review proceedings against Dr. Pinhas. Absence such allegations, plaintiff's complaint is deficient for failure to specify any particulars of the purported conspiracy.

In summary, plaintiff's antitrust conpsiracy allegations should be dismissed in their entirety because he has alleged a conspiracy among certain defendants legally incapable of conspiring and, even with regard to those defendants legally capable of conspiracy, his allegations are factually insufficient.

D. Plaintiff's Boycott Allegations Are Inadequate.

In his opposition, plaintiff clarifies his position that the alleged antitrust conspiracy is one that constitutes a "*per se* unlawful group boycott." Plaintiff correctly refers to the latest Supreme Court case which explained when the *per se* rule applies to group boycotts. In *F.T.C. v. Indiana Federation of Dentists*, 106 S.Ct. 2009, 2018, (1986), the Court reiterated that "the category of restraints classed as group boycotts is not to be expanded indiscriminately,

and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor . . ."

Plaintiff nowhere alleges that any of the defendants in the instant case enjoy market power. Plaintiff's depiction of the alleged impact of the mandatory government reporting requirements which result from a decision to terminate or restrict staff privileges is, at best, a strained attempt to position the defendants in the instant case with "market power". It is an attempt which this court should reject. As the Supreme Court said in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 105 S.Ct 2613, 2621 (1985), "The mere allegation of a concerted refusal to deal does not suffice [to warrant application of the *per se* rule] because not all concerted refusals to deal are predominantly anticompetitive."

If this court, consistent with defendants' position, rejects application of the *per se* rule, it should also reject plaintiff's contention (Opposition, p. 13, lines 14-17) that the alleged conspiracy between the defendants is presumptively anticompetitive such as to require defendants to come forth with proof of some countervailing competitive benefit from the alleged restraint. In support of his position, plaintiff refers to *FTC v. Indiana Federation of Dentists, supra* at 2018. Contrary to plaintiff's characterization, the Supreme Court's reference in that case to a defendant's burden to proffer a countervailing pro-competitive virtue was explicitly in the context of a horizontal agreement constituting a refusal to compete. Specifically, the Court, at 2018, said:

> "A *refusal to compete* with respect to the package of services offered to customers . . . impairs the ability

> of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services. [Citations omitted] — such an agreement limiting consumer choice by impeding the "ordinary give and take of the marketplace" . . . [citation omitted] cannot be sustained under the Rule of Reason." (Emphasis added.)

The Supreme Court went on to reference its earlier decision in *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S.Ct. 2948 (1984) to clarify that a naked restriction on price or output requires some competitive justification even in the absence of a detailed market analysis.

Since the alleged conspiracy by defendants in the instant case is not one involving either price or output restriction nor a refusal to compete, the allegations are subject to neither the *per se* rule nor a truncated rule of reason analyses. Rather, the sufficiency of plaintiff's pleading must be evaluated in the context of a traditional rule of reason approach where the "test of legality is whether the restraint imposed is such that it merely regulates and perhaps thereby promotes competition or whether it is such as it may suppress or even destroy competition. *Chicago Board of Trade v. United States*, 246 U.S., at 238, 38 S.Ct. at 244," quoted with approval in *F.T.C. v. Indiana Federation of Dentists*, 106 S.Ct. 2009, 2017 (1986). Since plaintiff had plead, at most, only an adverse economic impact on plaintiff's business revenue rather than on effect on competition in the market of ophthalmology services, plaintiffs' complaint is deficient.

As stated in defendants' moving papers, "no where does plaintiff allege an adverse affect on competition distinguished or distinguishable from the effects of plaintiffs' own medical practice.[6] Absent injury to competition, injury to plaintiff as a competitor will not satisfy the pleading requirement of Section 1." *Falstaff Brewing Company v. Stroh Brewing Company*, 628 F.Supp. 822, 827 (N.D.Cal. 1986), citing *Brunswick Corp. v. Pueblo Bowl-O-Matt, Inc.*, 429 U.S. 477, 488 (1977).

This court should heed the analysis of the Supreme Court in its *Northwest Wholesale Stationers* decision where the plaintiffs' expulsion from a cooperative buying arrangement consisting of its competitors was found unlikely to cause anti-competitive effects, unless the cooperative possessed market power or exclusive access to an element essential through effective competition. "Absent such a showing . . . courts should apply a rule-of-reason analysis." 105 S.Ct. at 2621.

As in the *Northwest Wholesale Stationers* case, Dr. Pinhas, in the instant dispute, has not been able to allege that defendants possess market power or exclusive access to an element essential to effective competition. Therefore, the sufficiency of plaintiff's First Amended Complaint must be read in the context of a case where plaintiff must proceed under a rule of reason analyses. In such a context, plaintiff must allege, with specificity, how competition in the market of "eye care and ophthalmic surgery in Los Angeles" is adversely affected. Plaintiff's First Amended Complaint is devoid of any such explanation and, accordingly, should be dismissed.

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[6]Nor does Complaint ¶ 122 advance plaintiff's position. Its assertion that the defendant doctors "will have a greater share of the eye care and ophthalmic surgery in Los Angeles" is not sufficient to allege a demonstrable anti-competitive effect in that market.

III.

PLAINTIFF'S CLAIMS REGARDING CIVIL RIGHTS ARE PATENTLY UNSUPPORTED BY ANY JURISDICTIONAL FACTS.

A. Plaintiff Still Fails To Demonstrate That This Court Has Subject Matter Jurisdiction In This Case.

Plaintiff's sole predicate for subject matter jurisdiction regarding these claims is the mere existence of California's statutory scheme governing hospital peer review proceedings. Plaintiff's arguments on the state statutory scheme were all rejected by this court in denying his application for a temporary restraining order in May. However, Plaintiff argues now in his opposition that state action exists because the California Business and Professions Code compels the collection and distribution of peer review information. *See* Business and Professions Code Sections 805 and 805.5. Plaintiff now claims, admitting that he has no case authority for the proposition, that the existence of this information distribution system, creates "state action" for purposes of federal jurisdiction in this case. Nothing could be further from the truth.

First, Section 805 of the Business and Professions Code serves simply as an information gathering and dissemination system regarding licensed healthcare professionals in California. That section requires the state agency to act as a collector and disseminator of information, and does not involve the state in making any judgments or interpretations of the information reported to it. To this extent the state is not "involved" in doing anything except acting as a conduit for information submit-

ted to it by private health facilities.[7] Thus, the action of

[7]Plaintiff cites two completely inapposite cases in support of his argument that dissemination of information like that contained on the Section 805 report gives rise to "state action" under the Civil Rights Laws. First, in *Marshall v. Sawyer*, 301 Fd.2d 639 (9th Cir. 1962), the Governor of Nevada, its Gaming Control Board, its Gaming Commission, individual members of the Board and Commission, and the private Nevada corporation which operated the Desert Inn Hotel and five employees of that corporation were sued under 42 U.S.C. § 1983 and 1985(3). The trial court dismissed the complaint as to all defendants, after only the state defendants moved to dismiss the complaint. The non-state defendants did not join in that motion nor did they appear as appellees before the Ninth Circuit. 301 F.2d at 643. Accordingly, their arguments, unlike those of moving defendants here, were not before the court. Moreover, the thrust of plaintiff's complaint was that the State of Nevada, through its state agencies (the Gaming Control Board and the Gaming Commission) promulgated a "black book" containing the names and pictures of persons designated as "undesirable" by them, all of which was done without notice or hearing to the persons so designated. Thus, there was no question that there was a *state* determination that included a "recital of the *findings made by the state agencies and officials* concerning the alleged undesirable character of identified individuals." 301 Fd.2d at 645 (emphasis added). In contrast, in the instance case, the State Board of Medical Quality Assurance, as noted, makes no "findings" and no "determination" whatsoever regarding the information it collects or disseminates. Furthermore, the determination of what to do with the information is not directed by the State of Califoria, but is left up to the individual health facilities that request it. For all the above reasons, the *Marshall* case is inapplicable.

Likewise, plaintiff cites the case of *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507 (1971). That case involved a state statute which permitted designated persons to forbid the sale or gift of intoxicating liquors to anyone who "by excessive drinking" exhibited certain traits. Pursuant to this statutory authority, the Chief of Police of Hartford, Wisconsin, without notice or hearing to Ms. Constantineau, posted a notice in all retail liquor outlets in Hartford prohibiting the sale or gift of liquors to her for a period of one year. The suit was brought only against the Chief of Police, a governmental official, and the State of Wisconsin thereafter intervened as a defendant on the injunctive phase of that case. 400 U.S. at 436, 91 S.Ct. at 509. Unlike the present case, the State through its own action had made a determination with regard to the individual, and no non-governmental parties were involved in the lawsuit. Accordingly, plaintiff cannot rely upon the holding of the *Constantineau* case for support here.

the state as a passive receptor and disseminator of information does not create the "sufficiently close nexus" clearly required under the *Jackson v. Metropolitan Edison Company* case, 419 U.S. 345, 350 (1974); nor is the state "involved in the specific activity complained of" to give rise to federal jurisdiction. *Taylor v. St. Vincent Hospital*, 523 F.2d 75, 77 (9th Cir. 1975).

Second, were the requirements of Business and Professions Code Section 805 et seq. sufficient to constitute state action for purposes of federal civil rights violations, the actions of the several hundred private hospitals in the state of California in compliance therewith would instantly be converted into actions of the State. There is absolutely no authority for this proposition, which defies common sense. Indeed, all Ninth Circuit precedents cited by defendants confirmed this fact. *See Aasum v. Good Samaritan Hospital*, 542, F.2d 792 (9th Cir. 1976); *Watkins v. Mercy Medical Center*, 520 F.2d 894 (9th Cir. 1975); and *Ascherman v. Presbyterian Hospital of Pacific Medical Center, Inc.*, 507 F.2 1103 (9th Cir. 1974). Plaintiff cites no cases in the medical staff area from any jurisdiction where such a reporting and dissemination function is performed that "create" state action on this basis.

Third, as previously argued in detail in Defendants' Opposition to Ex-Parte Application for A Temporary Restraining Order (filed on May 26, 1987), the entire

California statutory scheme, including but not limited to Section 805 *et seq.* of the Business and Professions Code, is established for the general purpose of promoting the work of peer review committees, and is thus analogous to funding subsidies and tax benefits that the state also may provide private hospitals. None of these laws authorize or require the State of California to participate in the deliberations of such peer review committees or to interject itself in those committees' decision-making process. *See* Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Ex-parte Application at Pages 5-7. Accordingly, just as neither funding subsidies nor tax benefits granted by the state confer upon private hospitals the status of state action, neither does the encouragement of the peer review process provided by such sections as 805 and 805.5 in the Business and Professions Code.

B. Plaintiff's Civil Rights Claims Still Fail to State Any Cause of Action.

Plaintiff now asserts that he has sufficently stated a cause of action to withstand dismissal under Federal Rule of Civil Procedure 12(b)(6) because, as he claims, his "due process" rights were violated. He admits, however, that he can supply this court with no federal case which decides the issue of whether due process requires the rights he claims at private hospital disciplinary proceedings. In so arguing, plaintiff admits that there is no case law or constitutional authority to support his assertion. For this reason alone, defendants' Motion should be granted.

C. The Health Care Quality Improvement Act and its Provisions are Inapplicable.

Nonetheless, plaintiff claims that the recently enacted Health Care Quality Improvement Act of 1986, 42 U.S.C.

§ 11111 absolutely entitles him to such procedural rights as right to counsel, right to an unbiased hearing panel, right to an unbiased hearing officer, right to call and cross-examine witnesses, right to adequate notice, etc. Plaintiff is in error.

Plaintiff's reliance upon the Health Care Quality Improvement Act for purposes of supporting his claims for civil rights violations is completely unwarranted and totally misplaced. This is because of two important facts, one of which plaintiff fails to mention at all. First, and critically, the immunity provided for a professional review actions set forth in § 11111(a) does not currently apply in the State of California.

This is because 42 U.S.C. § 11111(e) establishes in paragraph 1 that:

> "except as provided in paragraph (2), subsection (a) of this section shall apply to state laws in a state *only for professional review actions commenced on or after October 14, 1989.*" (Emphasis added).

Moreover, the exceptions set forth in paragraph (2), permit states to "opt-in" for "actions commenced before October 14, 1989." Plaintiff presents this court no information that California has "opted in" or that, if it has, that the instant action that commenced in April, 1987 is subject to the Act. Accordingly, the Health Care Quality Improvement Act, and its provisions regarding "due process", are inapplicable to this case.

Secondly, and more importantly, plaintiff correctly cites in footnote 11 on page 15 of his opposition papers the fact that the limitation on damages provided by the Health Care Quality Improvement Act is inapplicable to damages in actions relating to "civil rights", including, *inter alia*, 42 U.S.C. 1981 *et seq. See* § 11111(a)(1). There-

fore, even if, *arguendo*, defendants had followed all of the procedural requirements set forth in the Health Care Quality Improvement Act to the letter, no immunity would exist for them under the Act given these exceptions. Accordingly, the provisions of the Health Care Quality Improvement Act are completely inapplicable to plaintiff's discussion regarding civil rights.

Nevertheless, should this court hold that the Act is somehow relevant to its determination of these issues, the Plaintiff's argumentation on this point fails to come to grips with the specific language of the Act or its *legislative* intent. Based on that language and that intent, his arguments should also be dismissed.

The Act provides, in pertinent part, that if a healthcare entity strictly complies with all of the standards outlined in 42 U.S.C. § 11112(a) it shall not be liable in damages under any law of the United States or of any state with respect to the action taken. The Act thus imposes immunity on certain conduct based upon compliance with specified procedural standards. Critically, however, Section 11112(a)(3) states that its requirements may be satisfied by the provision of *either* the notice and hearing procedures of Section 11112(b) *or* "such other procedures as are fair to the physician under the circumstances." Most importantly, Section 11112(b)(3)(D)(ii) states that "failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection 11112(a)(3)." Accordingly, it is reasonable to conclude that the standard set forth in the Health Care Quality Improvement Act regarding the "adequate" notice and hearing requirements of Section 11112(b) are not exhaustive, and that "such other procedures as are fair to the physician under the circumstances" may be employed by health facilities. In

that absence of any authority to the contrary, defendants contend that the Hospital Medical Staff Bylaws, adopted pursuant to State law, clearly qualify as "such other procedures."

The legislative history behind the "adequate" notice and hearing requirements of the Act clearly supports this view. In incorporating the alternative of procedures "fair" to the practitioner "under the circumstances", Congress was clearly aware that some states had already established fairness requirements for peer review activities by case law or statutory enactment, which requirements did not include the specific rights enumerated in that section. Congress, nevertheless, felt that "in those situations, compliance with applicable law should satisfy the 'adequacy' requirement even where such activities or actions require different or fewer due process rights than those specified [in Section 11112(b)]." *See* H.R. Rep. No. 903, Part 1, 99th Congress, 2nd Session 10-11, reprinted in 1987 U.S. Code Cong. & Ad. News 6393.

It is respectfully submitted that, in the State of California, where existing case law has exhaustively addressed these issues, and where the courts afford plaintiff judicial review pursuant to California Code of Civil Procedure Section 1094.5, plaintiff's "due process" claims can be properly adjudicated. *See Anton v. San Antonio Community Hospital*, 19 Cal.3d 802 (1977); *Ascherman v. St. Francis Memorial Hospital*, 45 Cal.App.3d 507 (1975); *Westlake Community Hospital v. Superior Court*, 17 Cal.3d 465 (1976); and *Unterthiner v. Desert Hospital District*, 33 Cal.3d 285 (1983).

Based on the foregoing, plaintiff cannot demonstrate, and has not demonstrated, "state action" or the existence of federally protected constitutional rights for purposes of establishing this court's jurisdiction in this case. Ac-

cordingly, Defendants' Motion to Dismiss plaintiff's claims under Section 1983 and Section 1985(3) should be granted.

D. Abstention In This Case Is Warranted.

Plaintiff argues that the implementation of the Health Care Quality Improvement Act undercuts defendants' argument that this action "raises the important and sensitive issues of state health care policy" that should not be addressed in this forum. As noted above, the Health Care Quality Improvement Act supplements, not supplants, state policy and is inapplicable in several respects to plaintiff's civil rights claims. Thus defendants' position that state health care policy is clearly significant based on the facts of this case is still valid. All of plaintiff's citations to California state law and California state procedural remedies confirm this fact.

Since there is no dispute about the fact that there is a pervasive state policy regarding the importance of peer review activities in California, and since there is no dispute that there is extensive California state case law on this subject, (see Defendants' Motion to Dismiss, Pages 9-12, and cases cited therein), plaintiff's First Amended Complaint should be dismissed.

IV.

PLAINTIFF'S CLAIM FOR DECLARATORY RELIEF STILL DOES NOT PRESENT A CASE OR CONTROVERSY AGAINST MOVING DEFENDANTS.

Plaintiff's attempt to boot-strap his way into federal jurisdiction by filing a claim for declaratory relief seeking an adjudication of the constitutionality of the Health Care Quality Improvement Act of 1986 as well as the

constitutionality of Section 805 and 805.5 of the Business and Professions Code is completely without merit. Plaintiff does not rebut the clear fact that declaratory relief "does not confer an independent basis of jurisdiction of the federal court." *Alton Box Board Company v. Espirit de Corps*, 682 F.2d 1267 (9th Cir. 1982). As noted previously, Section 805 and Section 805.5 of the Business and Professions Code require reporting and dissemination of information by and to all health facilities in the State of California. Moving defendants have no authority to do anything but obey the ministerial requirements of those statutes, and have no enforcement authority in connection with them. Accordingly, the complaint should be dismissed as to this claim for relief pursuant to moving defendants Motion.

Similarly, the Health Care Quality Improvement Act is completely inapplicable to this factual situation. Plaintiffs ingenious attempts to seek a constitutional determination regarding that Act the this court has absolutely nothing to do with the underlying facts in this case. Whether or not that Act is constitutional will not affect plaintiff's rights, all of which devolve from state law "fair procedure" requirements and not from a federal law which, to date, has not been "opted into" by the State of California. Accordingly, plaintiff's claim for relief on this ground should be denied.

V.

SANCTIONS UNDER RULE 11 ARE WARRANTED.

While sanctions should not be used to chill an attorney's enthusiasm or creativity for pursuing factual or legal theories, in this case, plaintiff has not rebutted in his opposition the point that his First Amended Complaint is without factual foundation and is legally unreasonable.

Although plaintiff's counsel has attempted creativity, he has done so in direct contradiction to existing case law, which was specifically cited to him in defendants' Opposition to his Ex-parte Application for a temporary restraining order. *Ezpeleta v. Sisters of Mercy Health Corporation*, 800 F.2d 119 (7th Cir. 1986). Moreover, plaintiff has not changed any allegations whatsoever with respect to the factual foundation for state action, and continues to assert that defendants are somehow legally "estopped" from arguing that their conduct is not state action. It is a little late in the game for this plaintiff to request leave of this court to once again amend his complaint on these issues, particularly after having sufficient prior notice of his "creativity" defects.

Finally, plaintiff did not respond in any way to the arguments set forth in Defendants' Opposition that plaintiff's counsel has interposed the First Amended Complaint for improper purposes. Those arguments, set forth at pages 28-30 of the Defendants' Motion to Dismiss stand unrebutted. For those reasons alone, sanctions against plaintiff's counsel should be granted pursuant to Rule 11.

VI.

CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court dismiss plaintiff's First Amended Complaint in its entirety, and award sanctions to the Defendants.

Dated: September 14, 1987

WEISSBURG AND ARONSON, INC.
ROBERT J. GERST
J. MARK WAXMAN

By: _____(Signature)
J. MARK WAXMAN
Attorneys for Defendants

(PROOF OF SERVICE OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[CAPTION OMITTED IN PRINTING.]

EX PARTE APPLICATION TO RECONSIDER DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO VACATE ORDER DISMISSING CASE; REQUEST FOR JUDICIAL NOTICE; PROPOSED ORDER

COMES NOW Simon J. Pinhas, M.D., plaintiff, through his counsel of record, Lawrence Silver A Law Corporation and Blecher & Collins, and hereby seeks this Court's reconsideration of its decision announced on September 21, 1987 to dismiss the action herein, or in the alternative, to vacate its order, if entered, dismissing the action, and to take judicial notice of the granting of a Petition for a Writ of Certiorari by the Supreme Court of the United States in *Patrick v. Burgett,* 800 F.2d 1498 (9th Cir. 1986).

1. Defendants', in their Motion to Dismiss, placed principal reliance on the application of the "state action doctrine" immunity applied by the Ninth Circuit in *Patrick v. Burgett,* 800 F.2d 1498 (9th Cir. 1986), to peer review proceedings.

2. This Court in its decision rendered on September 21, 1987, (Transcript of Proceedings, pages 9-10), relied upon the application of the state action doctrine immunity to peer review proceedings citing *Marrese v. InterQual, Inc.,* 748 F.2d 373 (7th Cir. 1984), *cert. denied* 472 U.S. 1027, 105 S.Ct. 3501 (1985) as adopted by the Ninth Circuit in *Patrick v. Burgett, supra,* in its determination to dismiss the Complaint.

3. On October 5, 1987, the Supreme Court of the United States granted the Petition for a Writ of Certiorari in *Patrick v. Burgett, supra.*

4. It is appropriate, in light of the Supreme Court's issuance of a Writ of Certiorari, that this Court:

a. Take judicial notice of the issuance by the Supreme Court of a Writ of Certiorari in *Patrick v. Burgett, supra;*

b. Reconsider its determination to dismiss the action and require the hearing on the reconsideration to follow the Supreme Court's determination of *Patrick v. Burgett*; and/or

c. Vacate its order of dismissal, if entered.

DATED: October 6, 1987

LAWRENCE SILVER
A Law Corporation

By _____ (Signature)
Lawrence Silver,
Attorneys for Respondent
Simon J. Pinhas, M.D.

(PROPOSED ORDER OMITTED IN PRINTING)
(PROOF OF SERVICE OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[CAPTION OMITTED IN PRINTING.]

OPPOSITION TO EX PARTE APPLICATION FOR RECONSIDERATION

Plaintiff's Ex Parte Application for Reconsideration should be denied for the following reasons:

(1) No authority is cited for the proposition that this Court's decision was incorrectly made;

(2) No authority is cited for the proposition that the mere granting of a petition for *certiorari* is a basis to reconsider the decision in this case;

(3) It fails to meet the requirements for a motion for reconsideration under Local Rule 7.16;

(4) It fails to meet the requirement of motion for new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure; and

(5) It fails to meet the requirements necessary to obtain relief from a judgment or order pursuant to Rule 60 of the Federal Rules of Civil Procedure. Accordingly, the proposed order dismissing this action submitted by defendants should be entered.

Initially, Rule 7.16 of the Local Rules of the Central District state that a motion for reconsideration can be made only on grounds of a material difference in the relevant facts or the emergence of a change in law occurring after the time of the decision. The fact that cert was granted in this case would not change the decision of this Court for the following reasons. First, the Court itself determined as a matter of public policy that the anti-trust claims in this action should fail. This is made clear in reviewing the transcript of the hearing (a copy of which is attached as Exhibit A) wherein the Court did not place sole reliance on *Patrick v. Burget,* 800 F.2d 1498 (9th Cir. 1986), but relied on the overall policies embodied in California State Law decisions, the decision of the Seventh Circuit in *Marrese v. Intergard, Inc.,* 748 F.2d 373 (7th cir. 1984) and the desire to insure that medical staff processes were not threatened with anti-trust liability. In particular, the Court noted that recent legislation was

designed to provide additional safe harbor protection rather than reduce anti-trust immunities. (*See e.g.,* transcript of hearing at page 11). Accordingly the fact that the Supreme Court has determined to hear *Patrick v. Burget* does not constitute emergence of a change of law occurring after the time of the Court's decision.

Similarly, the requirements under Rule 59 of the Federal Rules of Civil Procedure have also not been met. Rule 59 provides that a motion for new trial may be granted and the Court may "open the judgment" solely to take additional testimony or amend its findings of fact and conclusions of law. There is no basis at this time to make such a determination and accordingly the judgment should be entered.

Rule 60 providing for relief from a judgment or order also does not provide that relief requested may be granted on an *ex parte* basis based upon the fact that a petition for certiorari has been granted in an independent, although legally related, action.

Finally, and independent of the rule cited, there is no authority cited by plaintiff herein for the proposition that: (a) plaintiff's motion should be considered on an *ex parte* basis; or (b) the granting of certiorari by the Supreme Court in an independent action is the basis for a motion for reconsideration after a Court determination has been made to enter judgment.

As a result of both the procedural and substantive insufficiency of the application, it should be denied.

Dated:

WEISSBURG AND ARONSON, INC.

By _____ (Signature)
J. MARK WAXMAN
Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE FERDINAND F. FERNANDEZ,
JUDGE PRESIDING

[CAPTION OMITTED IN PRINTING.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
MONDAY, SEPTEMBER 21, 1987

SUSAN A. LEE, CSR 2800, CM, RPR
Official Court Reporter
435 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 626-6353

APPEARANCES:

FOR THE PLAINTIFF:

LAWRENCE SILVER, ESQ.
9100 Wilshire Boulevard, Ste. 90212
Beverly Hills, California 90212
(213) 274-1580

Exhibit "A"

BLECHER AND COLLINS
By: ALICIA G. ROSENBERG, ESQ.
611 West Sixth Street, Ste. 2800
Los Angeles, California 90017
(213) 622-4222

FOR THE DEFENDANTS:

WEISSBURG AND ARONSON, INC.
By: J. MARK WAXMAN, ESQ.
2049 Century Park East, 32nd Flr.
Los Angeles, California 90067
(213) 277-2223

TRANSCRIPT OF PROCEEDINGS OF MONDAY, SEPTEMBER 21, 1987

HEARING: DEFENDANTS' MOTION TO DISMISS

LOS ANGELES — CALIFORNIA,
MONDAY, SEPTEMBER 1, 1987
— 10:00 A.M. SESSION

The Court: No. 8, Pinhas.

Mr. Silver: Lawrence Silver, Your Honor, for the Plaintiff Simon Pinhas.

Mr. Waxman: Mark Waxman for the defendants.

Mr. Silver: Your honor, there's also an additional appearance.

The Court: Oh, go ahead.

Ms. Rosenberg: Alicia Rosenberg for the plaintiff, also, Mr. Pinhas.

The Court: Thank you. You folks have seen the court's notes. If you'd like to be heard, I'll give you up to five minutes each. Of course, the moving party may go first.

Mr. Waxman: I think we'll submit on the tentative.

The Court: All right.

Mr. Silver: Your honor, in light of the court's tentative, I believe I do have a laboring oar.

The Court: I think you're right.

Mr. Silver: If I may first address the antitrust issue, and that is, unless I'm wrong, I think it's framed in the tentative whether or not *Patrick versus Burget* survives the enactment of the Health Care Quality Improvement Act. It is our position that *Patrick versus Burget* does not survive the Health Care Quality Improvement Act and that there is a specific congressional policy reason why the court should be moved to change the tentative afternoon ruling in that fashion.

That is, if you examine, as I'm sure Your Honor has, all the congressional concerns about, on the one hand, fairness to counsel and fairness to the physician who is under review, as compared to providing for a national repository of information regarding physicians who perform in a fashion less than satisfactory, congress and the great thrust of the matter, in addition to providing the antitrust immunity, was to provide for this repository.

Now, if the court holds, that is the judicial system holds, that in states such as Illinois, Indiana, New York, Pennsylvania, California, and Washington, as a beginning, because that's where we have decided cases, that there is no — that all of these types of proceedings are state actions, then defendants, or in this case, and defendants in other similar cases, can say, "we need not

comply at all with the Health Care Quality Improvement Act. We need not give due process. We need not give information to the National Repository. We need not buy in, because we already have an absolute, complete immunity under the state action doctrine."

Consequently, it seems that — it seems, Your Honor, that if the purpose of Congress was to let such defendants buy into antitrust immunity, in order to buy in, they had to do certain things. They had to, one, conduct hearings fairly, which they have not done here. They, two, had to provide a certain defense in those hearings, certain defense obligations, which has not been done here. And lastly, in order to buy in, they had to make reports to the National Clearing House.

If the state action doctrine protects them fully, without involvement with HCQIA, then there is no reason for them to buy in. They can continue to give hearings that lack due process. The can continue to not provide information to the National Repository. And therefore, by saying that the state action doctrine, as articulated in *Patrick v. Burget*, survives HCQIA is to interfere with congressional intent.

In addition, Your Honor, as I hand-delivered to Your Honor, as well as opposing counsel, a case on Friday, *Tambone v. Memorial Hospital*, the 7th Circuit Case, and the only case that mentions HCQIA, in that case the court found, at least on the basis of that record, that there were not sufficient facts to determine whether or not the state action doctrine applies.

Since *Marrese* is the seminal case out of the 7th Circuit, in which it says the state action doctrine applies, of course *Patrick* relies heavily on *Marrese*, that the 7th Circuit now says that you have some factual showing as to

whether or not the hand of the state is sufficiently involved in connection with the matter.

Your Honor's tentative ruling would mean that in light of the allegations of the complaint, but on the allegations of the complaint, Your Honor, it would determine that there is an absolute immunity as a matter of law without any factual showing by the defendants.

Consequently, I think for two reasons Your Honor should, one, determine that *Partick versus Burget* does not survive HCQIA, and, two — as well as the statutory language; and, two, because there needs to be a factual showing.

If I now might address myself to the Civil Rights Acts, Your Honor.

The Court: You ever a minute left.

Mr. Silver: That is a shame, Your Honor because I think that it is very important in terms of —

The Court: You have a minute left, in any event.

Mr. Silver: I'm sorry?

The Court: You have a minute left.

Mr. Silver: Thank you, Your Honor.

If we go to the old notions of what the Civil Rights Act was supposed to do, you take a look at the Ku Klux Klan going to the house of a minority and saying, "I'm a sheriff. Come with me," that a state actor under the old Civil Rights Act and the current Civil Rights Act is a person who claims authority under color or state law. That is also the rule, and consequently Your Honor's determination that these are not state actors within the meaning of the Civil Rights Act, I think would — there is a totally private action, quote, "under color of state law."

In the case that both parties rely upon, *Lugar versus Edmondson Oil,* there a person asked the sheriff to do something. A private person asked the sheriff to do something. And that private person was held to be in violation as a state actor in violation of the Civil Rights Act.

Further, as we have cited, both in *Wisconsin versus Constantineau,* as well as *John Marshall versus Sawyer,* there were private parties involved in the state action process, and that would be sufficient conduct under the threat or color of state law to bring them within the state action doctrine.

The Court: Thank you Mr. Silver.

Mr. Silver: Thank you, Your Honor.

The Court: Counsel wish to respond?

Mr. Waxman: Just briefly, You Honor. First, the health act cited obviously doesn't apply because of the date involved and the exemption which they failed to point out, both of those points. The medical staff case, *Patrick,* still is the law of the 9th Circuit. And of most interest is they never cite *Ezpeleta,* the leading case that the court cited itself the first time around.

So nothing really has changed this time from last time, and I think the Court's tentative should stand.

The Court: All right. Well, first of all, as to the antitrust claim, it seems to this Court that immunity does exist of necessity, and of necessity it must. It's clear to the Court that, at least in California, hospitals are among the most regulated institutions. That's made clear by the pleading in this case, even if the Court didn't bother picking up the California Administrative Code and the California Codes themselves.

That's because the Courts in this state, and properly so, and the legislature of this state, desire to have a very high quality medical care for the citizens of California. The regulatory scheme includes, of course, the Boards of Medical Examiners, boards to examine the nurses, the B.M.Q.A., peer review committees, and a good deal of additional supervision.

The policies are furthered, also, through common law principles which hold hospitals liable for the torts of their medical staff under many circumstances. In addition, of course, California has enacted a number of immunity statutes to protect the people who participate in the peer review process — and among those, of course, are California Civil Code 43.7 and 43.8, 47-2 — and has also enacted reporting laws so that the boards can accumulate information and thereby attempt to protect the public.

In *Marrese versus Intergard, Inc.,* at 748 Fed. 2d 373, the 7th Circuit case referred to here, 1984 case, the Court did consider the application of the state action doctrine in a private hospital setting under laws quite similar to California's, and it concluded that the antitrust laws did not apply.

That court also recognized the dilemma that's imposed upon hospitals and their governing boards and their staffs by the expectations of our society. Those individuals are placed between the scylla of suits by injured patients and the charybois of suits by disgruntled doctors who are denied or terminated from privileges.

The states have tried give some protection against this. And seems to the court it would be most inappropriate for the court to now determine that these actors are to be threatened with antitrust liability when they're working within a review process.

By the way, that very process does provide, at least under California state law, for ultimate review by the courts of the state so that a proper control can be kept over the damage that could be caused by inappropriate actions. And as counsel know, that appears in C.C.P. 1094.5. The 9th Circuit appears to be in agreement with that approach, as shown by *Patrick v. Burget*, at 800 F.2d 1498, 9th Cir., 1986.

Nor does the court think that the recent legislation by Congress, assuming it applies to this case, was intended to cut back on the antitrust immunity and therefore to make it easier to sue peer review participants in hospitals in states like Oregon and California which already have comprehensive laws regulating this area.

The genesis and the history of that legislation suggests to this court an intent to provide additional safe harbor protection for those persons and entities and not less protection. The recent case the Court's been cited to, the Court will note, did indicate that in the state there considered, the 7th Circuit was not dealing with laws like those that are enforced as they are in California, as opposed to what it was dealing with in *Marrese*.

The long and the short of it is that public policy makes it quite clear that people who participate in the assurance of medical quality should be protected from having to face antitrust lawsuits such as this one. And most courts and most legislative bodies who have addressed the issues have found that, for one reason for another.

It seems quite appropriate in this case if the state action doctrine continues as it has in the past and the congressional legislation be read as conferring the additional protection, and indeed to take the case like the Illinois case, it may indeed confer protection in states

which have no other process for protection of their own, as opposed to those such as Oregon and California.

As to the civil rights action, here again, the Court sees no cause of action spelled out. Simply put, no civil rights conspiracy can be shown, as there's no action of the state that is implicated in the deeds of these defendants.

The Court recognizes the possibility of a claim that if there is or is not state action for the purposes of antitrust doctrine, then the same must hold for the civil rights claim. But that, of course, would buy into the logical fallacy of assuming that the use of some word or phrase in two different contexts conveys the same meaning in both of those context. It does not. And *Ezpeleta v. Sisters of Mercy Health Corporation*, at 800 F.2d 119, 7th Circuit, 1986, demonstrates it does not.

There's nothing to suggest the state has participated in any way in the peer review process of the plaintiff. And it seems to the Court that it almost borders on the frivolous to state that the mere fact that the results of that process are to be reported converts the actions of the defendant into state actions for these purposes. Moreover, it seems to the Court rather inappropriate to rely on 43 U.S. Code 1085 where there's no racial or simply class-based animus pled or shown.

As to declaratory relief, the Court believes the defendants are correct in their contention that they are decidedly the wrong people to be contesting whether the California or federal reporting statutes are constitutional. First of all, it can be said that the controversy is hardly ripe, since as the Court understands it, the hospital proceeding is not yet final and certainly hasn't made its way to the court.

Secondly and more importantly, the plaintiff seeks to require the defendants to defend a state policy, and now a federal policy, that requires them to report their actions, or allows them to. It should be strange indeed to find that the defendants care one way or the other about whether those policies stand or fall, at least in the sense that they must make reports.

It certainly is counterintuitive to find that those who are forced to file reports to the government are the ones to defend the government's demand for the reports. It seems to me that if the plaintiff wants a review of California's policy of reporting in this regard, then these are not the parties to seek it from. Nor does it seem to the court that it's just or proper to impose the cost of defending federal and state policies of this nature upon these particular parties, a number of doctors in a private hospital.

Beyond that, the court thinks that it would be quite inappropriate to proceed with declaratory relief in this sort of situation, were it to find it otherwise should do so, because it would be simply unfair and unjust to these parties. It would be inequitable. And the court feels that if it had to do so, it would simply exercise its discretion to refuse to go forward with declaratory relief against these individuals.

For all of those reasons, the motions to strike for failure to state a cause of action should be and hereby are granted. However, considering the nature of the issues involved here, the court is certainly not going to impose Rule 11 sanctions at this time. The court will agree that in some ways one is surely tempted to impose such sanctions, particularly when a plaintiff seems to simply be striking out at everybody in sight, including even the

defendants' lawyers, in an attempt to drag everyone he can think of into a lawsuit.

Nevertheless, in the posture of this particular case at this time, the court is not able to find that Rule 11 sanctions should be imposed, since it is not convinced that the Rule 11 strictures have been violated.

That'll be the ruling of the court. The motion, as I say, is granted, without leave to amend. The court sees no purpose in granting leave to amend at this time. I don't see how the parties could possibly cure what I see as the basis for the civil process and legal defense. I think they stated what they had to state as well they can.

Would counsel please prepare an appropriate formal order.

Mr. Waxman: I will, Your Honor.

In view of the fact court has obviously spent a great deal of time analyzing the issues here, I wonder if the court would give some consideration to publishing this opinion. As the court knows, this comes up all the time between hospitals on statutes and medical staffs, and such an opinion would be of great assistance in clarifying the law in the area, in that it is somewhat a new area.

The Court: Well, I'll give it some consideration. But from looking over here at plaintiff's counsel, I have a sneaking suspicion that they're going to be asking for clarity from a more august body than this court, and you will probably have a published opinion of even greater import and value before long. But I will consider it.

Mr. Waxman: Thank you.

Mr. Silver: Your Honor, there's one, I believe, housekeeping matter that we should advise the court of, and that is plaintiffs did bring into this action the State of

California and there is a stipulation floating, that has left my office and may have reached Mr. Waxman's office, on it's way down to the State of California to dismiss the State as a party defendant to this action.

I believe that with leave, by the way, and plaintiff absolutely, to bring them back in, in the event that the defendants asserted they were necessary party, in order to short-circuit any other problems and paths to the circuit, I would nonetheless ask Your Honor to sign that order dismissing the State of California, as well as the order dismissing the action, so that if we do seek circuit review there is no short-circuiting it by this stipulation. I'd want a final order, in other words.

The Court: Sure. And I would think that if the State of California's dismissed and I granted these Motions to Dismiss without leave to amend, we've got nothing left. You've got a final order. Am I not correct?

Mr. Silver: Well, that'll have to await the signing of the stipulation as well as Your Honor's signing of this order.

The Court: Correct.

Mr. Silver: Thank you, Your Honor.

The Court: Okay.

(Proceedings Adjourned.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated: September 27, 1987

(Signature)

Susan A. Lee, CSR 2800, CM, RPR
Official Court Reporter

(PROOF OF SERVICE OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 87 03292 FFF (GHKx)

SIMON J. PINHAS, M.D.,
Plaintiff,

v.

SUMMIT HEALTH, LTD., a corporation; MIDWAY HOSPITAL MEDICAL CENTER, a California general hospital; THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER, an unincorporated association; MITCHELL FELDMAN; AUGUST READER; ARTHUR N. LURVEY; RICHARD E. POSELL; JONATHAN I. MACY; JAMES J. SALZ; GILBERT PERLMAN; PEGGY FARBER; MARK KADZIELSKI; WEISSBURG AND ARONSON, INC.; AND STATE OF CALIFORNIA BOARD OF MEDICAL QUALITY ASSURANCE,
Defendants.

WEISSBURG AND ARONSON, INC.
ATTORNEYS AT LAW
32nd Floor, Two Century Plaza
2049 Century Park East
Los Angeles, California 90067
J. MARK WAXMAN
Attorneys for Defendants

ORDER DISMISSING ACTION

On September 21, 1987 the Motions of defendants Summit Health, Ltd., Midway Hospital Medical Center, The Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, Arthur N. Lurvey, Richard E. Posell, Jonathan I. Macy, James J. Salz, Gilbert Perlman, Peggy Farber, Mark Kadzielski and

Weissburg and Aronson, Inc. to dismiss plaintiff's Complaint and this action made pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), together with defendants' Motions for Sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure came on for hearing before Ferdinand F. Fernandez, United States District Judge, Judge Presiding. The moving parties were represented by J. Mark Waxman, Esq. of Weissburg and Aronson, Inc. Plaintiff was represented by Lawrence Silver, Esq. and Alicia G. Rosenberg, Esq.

The Court, having considered all of the pleading, files, memoranda and documents on file herein, determined to grant the Motion for Dismissal filed by moving parties, and to deny the Motion for Sanctions pursuant to Rule 11.

Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED that plaintiff's Complaint against Summit Health, Ltd., Midway Hospital Medical Center, The Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, Arthur N. Lurvey, Richard E. Posell, Jonathan I. Macy, James J. Salz, Gilbert Perlman, Peggy Farber, Mark Kadzielski and Weissburg

and Aronson, Inc. shall be and is hereby dismissed without leave to amend.

Dated: October 2, 1987

(signature)
FERDINAND F. FERNANDEZ
United States District Judge

Presented by:
(signature)
J. MARK WAXMAN, ESQ.
Weissburg and Aronson, Inc.
Attorneys for Summit Health, Ltd.
et al.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[CAPTION OMITTED IN PRINTING.]

NOTICE OF APPEAL AND DEPOSIT OF APPEAL FEE

NOTICE IS HEREBY GIVEN that plaintiff Simon Pinhas, M.D. hereby appeals to the United States Court of Appeal for the Ninth Circuit from the Order entered on October 9, 1987, granting defendants' Motion to Dismiss.

The parties affected by this Order and their attorneys are: defendants Summit Health, Ltd., Midway Hospital Medical Center, The Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, Arthur N. Lurvey, Richard E. Posell, Jonathn I. Macy, James J. Salz, Gilbert Perlman, Peggy Farber, Mark Kadzielski, and Weissburg & Aronson, Inc., by their counsel, Weissburg & Aronson, by J. Mark Waxman, 2049 Century Park East, 32nd Floor, Los Angeles, California 90067 and Simon J. Pinhas, M.D., by his counsel, Lawrence Silver A Law Corporation, by Lawrence Silver, 9100 Wilshire Boulevard, Suite 360 West, Beverly Hills, California 90212 and Blecher & Collins, by Maxwell M. Blecher, 611 West Sixth Street, Suite 2800, Los Angeles, California 90017.

Plaintiff transmits herewith the appeal fee in the sum of $105.00.

DATED: October 21, 1987

LAWRENCE SILVER
A Law Corporation

By: _____(Signature)_____
Lawrence Silver,
Attorneys for Respondent
Simon J. Pinhas, M.D.

(PROOF OF SERVICE OMITTED IN PRINTING)